

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALBERT J. GALEN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Montana.

FILED

OCT 11 1917

W. H. WILKINSON,
CLERK

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Circuit Court of Appeals
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Plaintiff in Error,

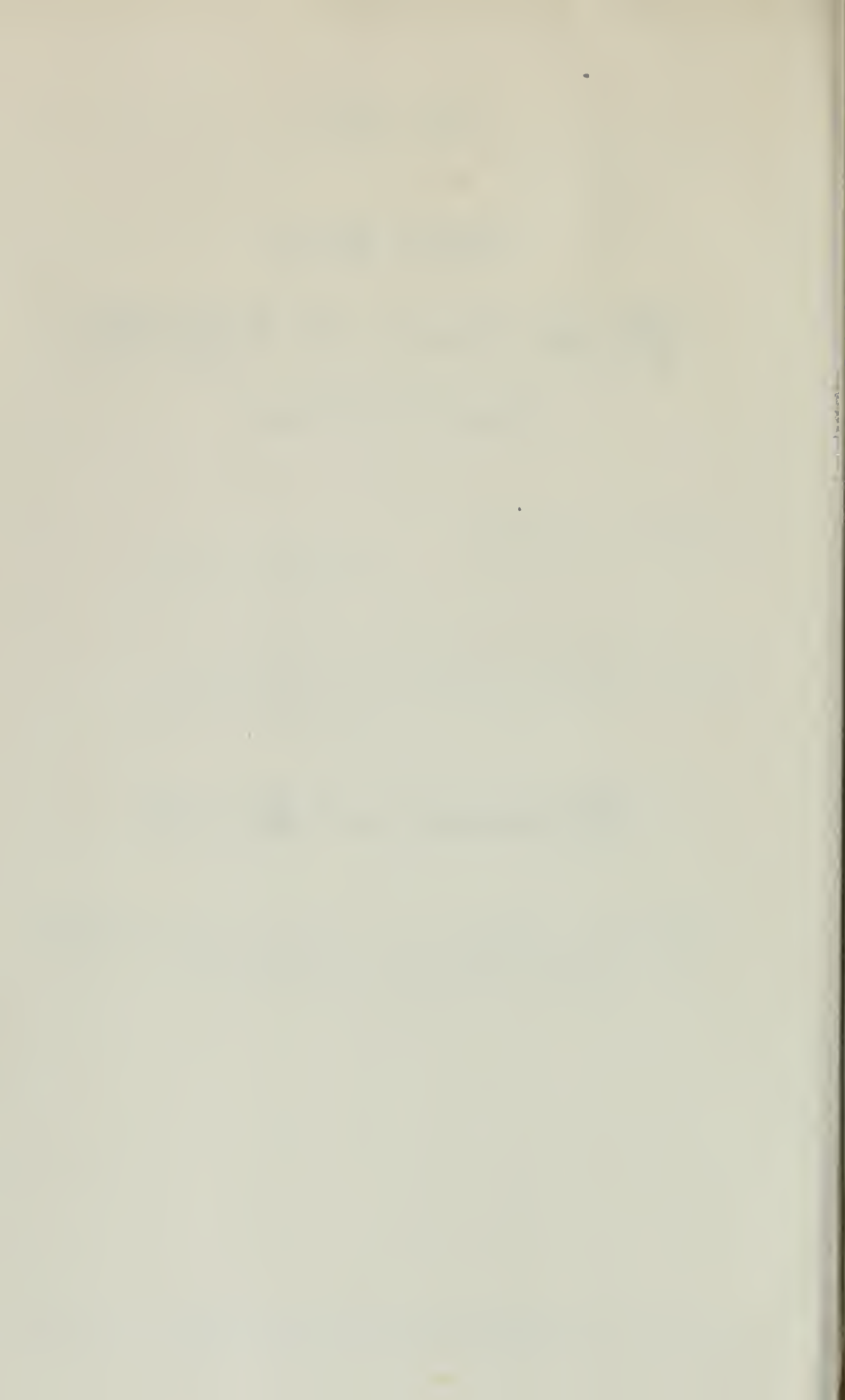
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Upon Writ of Error to the United States District
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Defendant and Plaintiff in
Error. [1*]

*In the District Court of the United States, in and for
the District of Montana.*

In the Matter of the Contempt of DANIEL M.
KELLY and ALBERT J. GALEN.

BE IT REMEMBERED, that on February 1,
1917, an Information in the above-entitled matter
was duly filed in said court, said Information being
in the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript
of Record.

*In the District Court of the United States for the
District of Montana.*

In the Matter of the Contempt of DANIEL M.
KELLY and ALBERT J. GALEN.

Information.

At an adjourned November Term, A. D. 1916, of the United States District Court for the District of Montana held in the city of Helena, in the State and District of Montana, beginning on the 2d day of January, A. D. 1917, in pursuance of an order of the above-entitled court directing the filing of this information, comes now Burton K. Wheeler, United States Attorney for the District of Montana, and informs the Court:

That at the said term of said court, to wit, on the 15th day of January, A. D. 1917, at the city of Helena, in the State and District of Montana, afore-said, there came on to be tried in said court before the Honorable George M. Bourquin, then and still Judge of said court, and a jury of twelve men duly empaneled and sworn for that purpose, a certain issue, in due manner joined between the United States of America and certain persons, to wit, A. M. Alderson, W. C. Rae, R. R. Sidebotham, J. G. G. Wilmot, J. W. Speer, D. G. Bertoglio, M. A. Cort, C. A. Rainwater, C. W. Tobin and W. W. White, upon a certain criminal indictment then and there pending in said court against the said A. M. Alderson, W. C. Rae, R. R. Sidebotham, J. G. G. Wilmot, M. A. Cort, J. W. Speer, D. G. Bertoglio, C. A.

Rainwater, C. W. Tobin and W. W. White, and charging them and each of them with having wrongfully, [3] unlawfully, and feloniously devised a scheme and artifice to defraud divers persons mentioned in said indictment, of certain moneys and property, and in furtherance of said scheme had placed or caused to be placed in the postoffice of the United States at Great Falls, Montana, certain letters, all as alleged in said indictment, and said indictment further charged the said A. M. Alderson, W. C. Rae, R. R. Sidebotham, J. G. G. Wilmot, M. A. Cort, J. W. Speer, D. G. Bertoglio, C. A. Rainwater, C. W. Tobin, and W. W. White with having confederated, combined and conspired to violate a law of the United States, to wit, section 215 of the Penal Code of the United States of 1910, by forming a conspiracy to devise and artifice or scheme to defraud divers persons of their moneys and property and in furtherance thereof use the mails and postoffice establishment of the said United States, contrary to the statute in such case made and provided and against the peace and dignity of the United States of America; that the trial of said cause continued daily from the said 15th day of January, A. D. 1917, with adjournment of said court from day to day, until the termination thereof, to wit, on the 27th day of January, A. D. 1917; that at the time of each and every one of the said adjournments of said court, while said cause was still pending and undetermined and the trial thereof in progress, to wit, at or about the hour of thirty minutes after five o'clock in the afternoon of each of

said days when such adjournments would be taken, the Court duly admonished the said jury in accordance with law as to its conduct during the said adjournment of said court and cause, and adjourned the said court and the trial of said cause until ten o'clock in the forenoon of the following day, and said jury would thereupon separate and go to their respective places of abode, in the said city of Helena, Montana; that long before and ever since the first day [4] of January, A. D. 1917, the said Daniel M. Kelly and Albert J. Galen were, and now are attorneys and counsellors at law and admitted to practice in the said District Court of the United States for the District of Montana and members of the bar thereof and as such they, the said Daniel M. Kelly and Albert J. Galen, appeared in the above-entitled court for and on behalf of the said A. M. Alderson and W. C. Rae on the trial and defense of said cause and acted as such for the said A. M. Alderson and W. C. Rae throughout the trial of said cause.

That the said Daniel M. Kelly and Albert J. Galen, and each of them, being attorneys for the said A. M. Alderson and W. C. Rae, on the trial of said case as aforesaid, and during the pendency of said trial, did, in the city of Helena, in the county of Lewis and Clark, State and District of Montana, in the presence of said court or so near thereto as to obstruct the administration of justice, commit a contempt of this court, in this that the said Daniel M. Kelly and Albert J. Galen, between the said 15th day of January, 1917, and the 27th day of January,

1917, during the adjournments of said court during said trial as aforesaid, visited and conversed with certain members of said jury, empaneled, and sworn to try said case, as aforesaid, knowing them to be jurors empaneled and sworn to try said case as aforesaid with a view of improperly influencing the actions of said jurors in their deliberations and determination of said cause of the United States of America against the said Alderson and others; and the said Albert J. Galen, in the presence of said court or so near thereto as to obstruct the administration of justice, did, on the 23d day of January, 1917, during the pendency of the trial of said [5], case and during the adjournment of said court from the said 23d day of January, 1917, to the 24th day of January, 1917, in the bar-room of the Placer Hotel, in the city of Helena in the State and District of Montana, visit and converse with one W. B. Warner, who then and there was one of the jurors empaneled and sworn to try said case as aforesaid, with a view on the part of said Albert J. Galen then and there had to improperly influence the actions of the said W. B. Warner, a juror in said case as aforesaid, in his deliberations and determination of the said case then on trial as aforesaid, and the said Albert J. Galen did then and there furnish and give to the said W. B. Warner, knowing him to be a juror as aforesaid in said case, liquid refreshments, and he, the said Albert J. Galen, did at the time of so furnishing said liquid refreshments to the said juror W. B. Warner partake of and drink liquid refresh-

ments himself in company with the said juror W. B. Warner.

And the said Daniel M. Kelly, in the presence of said Court or so near thereto as to obstruct the administration of justice, did, on the 24th day of January, 1917, in the bar-room of the Placer Hotel, in the city of Helena, in the State and District of Montana, visit and converse with one Charles E. Brown, who then and there was one of the jurors empaneled and sworn to try said case as aforesaid, with a view on the part of said Daniel M. Kelly then and there had to improperly influence the actions of the said Charles E. Brown, a juror in said case as aforesaid, in his deliberations and determination of the said case then on trial as aforesaid, and the said Daniel M. Kelly did then and there furnish and give to the said Charles E. Brown, knowing him to be a juror as aforesaid in said case, liquid refreshments, and he, the said Daniel M. Kelly, did at the time of so furnishing said liquid refreshments to the said jurors Charles E. [6] Brown:

That the said Daniel M. Kelly and Albert J. Galen, and each of them, in the presence of said court or so near thereto as to obstruct the administration of justice, did, on the 24th day of January, 1917, during the pendency of said case and during an adjournment of said court from the said 24th day of January, 1917, to the 25th day of January, 1917, in the Placer Hotel, in the city of Helena, in the State and District of Montana, visit and converse with the said W. B. Warner, the said Daniel M. Kelly and Albert J. Galen then and there well knowing

that said W. B. Warner was then and there one of the jurors duly impaneled and sworn to try said case, as aforesaid, and with a view on the part of the said Daniel M. Kelly and Albert J. Galen, and W. B. Warner, juror as aforesaid, in his deliberations and determination of the said case, then on trial and adjourned as aforesaid, and did promise the said W. B. Warner to introduce him, the said W. B. Warner, to some of the members of the Fifteenth Legislative Assembly of the State of Montana, which said Fifteenth Legislative Assembly was then in session in the said city of Helena, in said State and District of Montana, for the purpose of securing for the said W. B. Warner the aid, assistance and support of some of the said members of the said Fifteenth Legislative Assembly in the passage of a certain bill which had theretofore been or was about to be introduced in said Fifteenth Legislative Assembly of the said State of Montana, and which the said W. B. Warner was interested in and desirous of having passed as a law by the said Fifteenth Legislative Assembly of the State of Montana.

WHEREFORE, it is prayed that a citation issue out of this Court directing the said Daniel M. Kelly and Albert J. Galen to show cause on a day certain before this Honorable Court why they, and each of them, should not be adjudged in contempt of this Court.

B. K. WHEELER.

United States Attorney, District of Montana. [7]

United States of America,
District of Montana,—ss.

Burton K. Wheeler, being first duly sworn, deposes and says that he is the duly appointed, qualified and acting United States Attorney for the District of Montana; that he has read the foregoing information and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

B. K. WHEELER.

Subscribed and sworn to before me this 1st day of February, A. D. 1917.

[Seal]

C. R. GARLOW,
Deputy Clerk U. S. District Court, District of Montana.

The matters herein having heretofore been brought to the attention of the Judge in Chambers by the District Attorney in discharge of the duties of his office, and now in open court advising the Court there are credible witnesses and evidence tending to prove the allegations herein, and the same appearing to the Court of sufficient moment to require an open and full investigation by prosecution for contempt, it is ordered this information be filed and an order to show cause as prayed be issued, returnable February 7, 1917, at 10 A. M. to be served with a copy of this petition or information at least 4 days prior thereto.

BOURQUIN, J.

Filed Feb. 1st, 1917. Geo. W. Sproule, Clerk.
By C. R. Garlow, Deputy. [8]

Thereupon, on said 1st day of February, 1917, a citation was issued upon said information, which said citation, in words and figures, is as follows:

Citation.

*In the District Court of the United States, in and for
the District of Montana.*

The President of the United States of America, to
Daniel M. Kelly and Albert J. Galen, GREET-
ING:

You are hereby cited and admonished to be and appear before the United States District Court for the District of Montana, at the courtroom of said court, in the Federal Building, in the City of Helena, Lewis and Clark County, State and District of Montana, on February, 7, 1917, at 10 o'clock A. M., then and there to show cause, if any there be, why you should not be adjudged in contempt of said court for actions so near to the presence thereof as to obstruct the administration of justice, in unlawfully and knowingly endeavoring to improperly influence certain jurors in the case of the United States vs. A. M. Alderson et al., during the trial of said cause before said court at Helena, Montana, between the 15th day of January, 1917, and the 27th day of January, 1917, as more fully appears from the information filed herein, a copy of which, together with the order of the court, is herewith served upon you.

WITNESS the Honorable GEO. M. BOURQUIN,
United States District Judge for the District of

Montana, this 1st day of February, A. D. 1917.

[Seal]

Attest: GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk. [9]

Return to Citation.

This is to certify and return that I served the within Citation together with bill of complaint on the therein named Albert Galen and D. M. Kelly, by handing to and leaving with each of them a true copy of same at Helena, Lewis & Clark County, Montana, on the 1st day of Feby., 1917.

JOSEPH L. ASBRIDGE,

United States Marshal.

Filed Feb. 2, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [10]

Thereafter, on Feb. 7, 1917, a Demurrer to the Information was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Demurrer to Information.

Come now Daniel M. Kelly and Albert J. Galen and demur to the information filed herein on February 1, 1917, upon the ground that the said information does not state facts sufficient to constitute a contempt; and prays the judgment of the Court hereon whether they must or may further appear

or plead to said information.

F. W. METTLER,

L. O. EVANS,

F. C. WALKER,

W. T. PIGOTT,

Attorneys for said Kelly and Galen.

Filed Feb. 7, 1917. Geo. W. Sproule, Clerk. By
C. R. Garlow, Deputy. [11]

Thereafter, on Feb. 7, 1917, Motion to Quash was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Motion to Quash Order to Show Cause.

Come now the said Daniel M. Kelly and Albert J. Galen, and hereby respectfully move the Court to set aside and quash the Order to Show Cause made in said proceeding on the 1st day of February, 1917, and the citation issued thereon, for the reasons following, to wit:

1. Because the information upon which said order was based and issued or made does not state facts sufficient to constitute a contempt of this court, in this, that the said information does not state the nature and cause of the charge or accusation attempted to be made therein.

2. Because the said information fails to state sufficient facts to put these contemnors upon their defense.

3. Because it is apparent from the face of said information and the affidavit in support thereof that

the averments of said information are not supported, either in whole or in part, by any affidavit of any person who witnessed the pretended acts alleged to constitute a contempt, or contempts of this Court, the only affidavit being that of the United States Attorney for the District of Montana, who therein swears that "the matters and things therein contained are true to the best of his knowledge, information and belief," and who is not stated or shown to possess any knowledge of the facts constituting the accusation.

L. O. EVANS,
W. T. PIGOTT,
F. W. METTLER,
FRANK C. WALKER,

Attorneys for Daniel M. Kelly and Albert J. Galen.

Filed Feb. 7, 1917. Geo. W. Sproule, Clerk. By
C. R. Garlow, Deputy. [12]

Thereafter, on Feb. 7, 1917, pleas of not guilty were duly entered by respondents herein, the record thereof being in the words and figures following, to wit:

No. 2860.

In re Contempt of D. M. KELLY and A. J. GALEN.
Pleas of Not Guilty of D. M. Kelly and A. J. Galen.

This matter came on regularly for hearing at this time, the contemnners being personally present in court, and the United States Attorney and his two Assistants appearing on behalf of the United States. Thereupon, on motion of W. T. Pigott, Esq., it was

ordered that the names of L. O. Evans, F. W. Mettler, F. C. Walker and W. T. Pigott, Esqs., be entered herein as attorneys for contemnors. Thereupon counsel for contemnors presented and filed a motion to quash the information herein, which motion, after due consideration, was denied by the Court and exception of contemnors noted. Thereupon counsel for contemnors presented and filed a demurrer to the information, which demurrer, after due consideration, was overruled and exception noted.

Thereupon each of the said contemnors pleaded that he is not guilty and plea of not guilty duly entered as to each.

Entered in open court February 7, 1917.

GEO. W. SPROULE,
Clerk. [13]

Thereafter, on July 7, 1917, Judgment was duly entered herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Judgment.

This matter coming on regularly to be heard in open court on the 7th day of February, 1917, B. K. Wheeler, United States Attorney for the District of Montana, and Homer G. Murphy and James H. Baldwin, Assistants United States Attorney for the District of Montana, appearing on behalf of the United States, and L. O. Evans, W. T. Pigott, F. W. Mettler and Frank C. Walker, appearing as counsel

on behalf of respondents, and after the conclusion of the testimony offered on behalf of all parties said matter was argued by counsel for the respective parties and thereupon submitted to the Court for its decision; and thereafter on the 13th day of June, 1917, the Court, after having fully considered said matter, rendered its decision herein, which is hereby made a part hereof, wherein and whereby the Court found that the accusations in the information are true and that respondents' conduct constituted misbehavior obstructing the administration of justice as charged, and that the respondents did commit a contempt of this court, and ordered and adjudged that for such contempt each of them is fined in the sum of \$500.00 and costs.

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the Court that the said Daniel M. Kelly and Albert J. Galen did commit a contempt of this court as alleged in the information herein, for which contempt it is ordered and adjudged that each of them be fined in the sum of \$500.00, and costs taxed at One Hundred Sixteen 65/100 Dollars.

Entered July 7, 1917.

GEO. W. SPROULE,
Clerk. [14]

Thereafter, on July 18, 1917, a Bill of Exceptions of the respondent, Albert J. Galen, was duly settled and allowed and filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

Bill of Exceptions.

BE IT REMEMBERED, in the above-entitled proceedings in the above-entitled court, that an information was filed on the 1st day of February, 1917, which said information, in words and figures, is as follows:

(Here follows copy of information as appears at page — of this transcript.)

Thereupon, on said 1st day of February, 1917, a Citation was issued upon said Information, which said Citation, in words and figures, is as follows:

(Here follows copy of Citation as appears at page — of this transcript.) [15]

Thereafter, and on the 7th day of February, 1917, pursuant to the order to show cause and citation aforesaid, the said defendants, Daniel M. Kelly and Albert J. Galen, appeared personally and by their attorneys, F. W. Mettler, W. T. Pigott, L. O. Evans, and F. C. Walker. The United States of America appeared by Burton K. Wheeler, United States Attorney for Montana, and Homer G. Murphy and James H. Baldwin, Assistant United States Attorneys for Montana.

Thereupon, orally in open court, the said defendants moved the Court aforesaid to quash and set aside the order to show cause, and the citation issued

thereon, which said motion to quash is as follows, to wit:

By Judge PIGOTT.—If the Court please, in response to the order to show cause, we interpose the following motion to quash and set aside the order to show cause, and the citation issued therein, for the following reasons, to wit:

1. Because the information upon which said order was based and issued or made does not state facts sufficient to constitute a contempt of this court, in this, that the said information does not state the nature and cause of the charge or accusation attempted to be made therein.

2. Because the said information fails to state sufficient facts to put these contemnners upon their defense.

3. Because it is apparent from the face of said information, and the affidavit in support thereof, that the averments of said information are not supported, either in whole, or in part, by any affidavit of any person who witnessed the pretended acts alleged to constitute a contempt, or contempts of this court, the only affidavit being that of the United States Attorney for the District of Montana, who therein swears “that the matters and things therein contained are true to the best of his knowledge, information and belief, [16] and who is not stated or shown to possess any knowledge of the facts constituting the accusation. (Signed by Counsel.)” which said motion to quash was overruled by the Court and denied, to which ruling of the Court defendants then and there duly excepted.

Thereupon the said defendants demurred to the said information, said demurrer being as follows, to wit:

“By Judge PIGOTT.—In order to preserve the record, we file a demurrer on the general ground that the information does not state facts sufficient to constitute a contempt of this court, and the same ruling, I suppose, will be made, and exception taken.”

which said demurrer was overruled by the Court and denied, to which ruling of the Court defendants then and there duly excepted.

Thereupon the said defendant, Albert J. Galen, being then and there personally present, by his counsel, pleaded not guilty to said information, and the said defendant, Daniel M. Kelly, being then and there personally present, by his counsel, pleaded not guilty to said information.

Whereupon, the following proceedings were had and done, to wit: [17]

It was thereupon stipulated by and between counsel for the United States and counsel for the said Albert J. Galen and Daniel M. Kelly for and on behalf of their respective clients that a certain criminal cause, to wit, cause No. 2842, entitled United States of America versus A. M. Alderson et al., came on to be tried in the above-entitled court before the Honorable George M. Bourquin, Judge thereof, and a jury duly empaneled and sworn to try the issues therein upon an indictment theretofore returned against the defendants, A. M. Alderson et al., upon a plea of not guilty by said defendants on the 15th

day of January, A. D. 1917, the same being the adjourned November term, A. D. 1916, of the said United States District Court, for the District of Montana, and that the trial of said cause No. 2842 proceeded from day to day until the termination thereof on the 27th day of January, A. D. 1917; that one W. B. Warner and one Charles Brown were two of the jury which had been duly impaneled and sworn to try said cause No. 2842, United States of America versus A. M. Alderson et al., that Albert J. Galen and Daniel M. Kelly were at all times during the trial of said cause No. 2842 the only attorneys of record or engaged in the defense of two of the defendants in said cause, to wit, A. M. Alderson and W. C. Rae, and of them only. [18]

Testimony of Charles Brown, for the Government.

CHARLES BROWN, a witness called and sworn on behalf of the Government, testified as follows: '

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name.

A. Charles Brown.

Q. Your business? A. Rancher.

Q. You reside where? A. At Jefferson City.

Q. You were one of the jurors who was empaneled and sworn to try the case of the United States of America vs. A. M. Alderson and others?

A. Yes, sir.

Q. And you are acquainted with Mr. Daniel M. Kelly? A. Yes, sir.

Q. And with Mr. Albert Galen? A. Yes, sir.

(Testimony of Charles Brown.)

Q. I will ask you, Mr. Brown, on or about the 25th day, while you were empaneled, and while you were sitting in the case, I will ask you if you saw Mr. Kelly, Mr. Dan Kelly, in the lobby of the Placer Hotel? A. Yes, likely I saw him.

Q. Well, refreshing your memory, Mr. Brown, I will ask you if it is not a fact that you talked with him in the Placer Hotel on the evening of the 24th day of January for a period of about ten or fifteen minutes. A. Well, I don't think I did.

Q. Well, how long did you talk to him, if at all?

A. No, sir; I don't remember of talking to him, to Mr. Kelly at any time during the trial.

Q. You don't recall talking to him at any time during the trial? [19] A. No, sir.

Q. Let me ask you, Mr. Brown, if you—

A. That is, in the lobby of the hotel.

Q. Let me ask you, Mr. Brown, to refresh your memory again, if you don't remember having stood in the lobby of the hotel and having talked with him for at least twenty minutes, standing right in the center of the lobby of the hotel.

A. Not during the trial, no.

Q. Not during the trial? A. No, sir.

Q. Did you have any drinks at all with Mr. Kelly during the course of the trial of the case?

A. Yes, sir.

Q. Whereabouts?

A. In the bar of the Placer Hotel.

Q. How? A. In the bar of the Placer Hotel.

Q. Now, Mr. Brown, who was present at the time

(Testimony of Charles Brown.)

that you had the drink with him?

A. Well, I don't remember the men that were there. Mr. De Hart was there, according to my recollection, —I don't remember of any,—I remember the attorney, I cannot recall his name.

Q. Mr. Cowley? A. Yes, he was there.

Q. Let me ask you, Mr. Brown, if it is not a fact that after you had this talk with Mr. Kelly inside of the lobby of the hotel for a while, and then walked into the bar of the Placer Hotel, and there met Mr. Cowley, and that Mr. Kelly put some money on the bar, bought a drink, that yourself, Mr. Kelly, Mr. Cowley were there, and if I myself was not standing up at the end of the bar talking with Mr. Galen and Mr. Rankin? [20]

A. Yes, you were there,—but I couldn't tell,—I will tell all I know, that is all I know.

Q. Well, you know whether or not you walked in from the lobby of the hotel into the bar?

A. I walked in; yes, sir.

Q. And with Mr. Kelly? A. No, sir, I did not.

Q. You didn't walk into the bar?

A. I didn't walk in with Mr. Kelly.

Q. Who did you walk in there with?

A. I think it was De Hart, that is my,—I am not positive it was De Hart.

Q. Let me ask you if it isn't a fact that Mr. De Hart was not present there at all that night.

A. Well, as I remember it, it was Mr. De Hart, I may be wrong. As I remember it, it was Mr. De Hart.

(Testimony of Charles Brown.)

Q. Well, do you not have any recollection at all as to having talked to Mr. Kelly that night out in the lobby of the hotel just prior to your coming in there, and taking a drink with him? A. No, sir.

Q. What time was it that you took this drink with Mr. Kelly there, do you know the date?

A. I don't know the date. I know I did it, but I don't know the date.

Q. Well, who paid for that drink?

A. Well, I think Mr. Kelly paid for the drink, but I absolutely don't know.

Q. You drank at his request, did you?

A. Yes, sir.

Q. Mr. Brown, you talked with Mr. De Hart, did you, on that evening? [21]

A. Well, that is my impression, that I talked to Mr. De Hart.

Q. How long have you known Mr. De Hart?

A. Well, I had known him for quite a few years, that is, not intimately, lately, I am quite well acquainted with Mr. De Hart.

Q. You got acquainted with both De Hart and Dr. Butler when you came over here as a juror in this case.

A. Oh, no; I have known Mr. De Hart for a long time.

Q. When did you meet Dr. Butler, the State Veterinarian, isn't that his name, Mr.—

A. I think I have been in his office for several years, I don't know that I know the year.

Q. Were you out at his office at all with Mr. Kelly?

(Testimony of Charles Brown.)

A. No, sir.

Q. You are a very close friend of Mr. Kelly's and have been for some time, haven't you, Mr. Brown?

A. Yes, sir.

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Brown, how long have you known Mr. Kelly?

A. Well, ever since he came to Montana.

Q. Your ranch is where, Mr. Brown?

A. It is twenty miles from here on the Great Northern road near Jefferson City.

Q. And just close to Jefferson City?

A. Just close to Jefferson City, yes, sir.

Q. In Jefferson County? A. Yes, sir.

Q. Mr. Kelly was county attorney over there at least one or two terms? A. Yes, sir.

Q. And somewhat active in politics?

A. Yes, sir.

Q. What are your politics, Mr. Brown? [22]

A. Democrat.

Q. The same as Mr. Kelly? A. Yes, sir.

Q. Mr. Brown, without going into the details, are you well to do from the ordinary farmer's standpoint?

A. Well, I have a living, good living, I have a good place.

Q. You own your farm?

A. Yes, sir. No debts on it at all.

Q. How many acres?

A. There is one thousand acres, I believe.

(Testimony of Charles Brown.)

Q. You have cattle? A. Yes, sir.

Q. Are you a married man, Mr. Brown?

A. Yes, sir.

Q. How many children have you?

A. I have eight children.

Q. Now, Mr. Brown, where were you staying through that trial? A. I stayed at the Eddy.

Q. Across from the Placer? A. Yes, sir.

Q. Did you occasionally, or quite often go over to the Placer Hotel, evenings?

A. Yes, I did, I walked around on the outside of the crowd around there, and looked around.

Q. And would you see Mr. Kelly there in the lobby with other gentlemen, do you recall, at all?

A. Yes, I would see him, yes, sir.

Q. Now, Mr. Brown, I will ask you if you are not positive that you never talked to Mr. Kelly, except to say how-do-you-do to him during that trial, at any time? A. Not, during the trial, no. [23]

Q. Or with Mr. Galen, did you ever converse with Mr. Galen during the trial at all? A. No, sir.

Q. How long have you known Mr. Galen?

A. For a number of years, just casually, until just lately, until the last few years.

Q. Just tell us in detail how you came to be in the bar that night, as you recall it, at the Placer Hotel.

A. It is hard to say just how I came to be in there. I remember,—I can say that I was just standing in there.

Q. Well, did you go in with Mr. De Hart, or did you meet him in there?

(Testimony of Charles Brown.)

A. I wouldn't say for sure, I am not certain about that, I know I was standing there with Mr. De Hart.

Q. Did you have any particular business with De Hart that night? A. Yes, sir.

Q. What were you looking for him for?

A. We were trying to get him interested in coming out and getting our water cleared out there; the concentrator is dirtying the water, the water was freezing up and running over the land, and I have been trying to get him and the State officials to intercede for us, and they have promised to do it. I was talking to him about that. I think it was that night.

Q. Mr. De Hart is State game warden, is he not?

A. Yes, sir.

Q. And your idea was that he could intercede perhaps on the question of fish protection for you?

A. Yes, sir.

Q. That was an important thing for you, Mr. Brown, so that you have in mind what you were particularly talking to Mr. De Hart about it?

A. Yes, sir. [24]

Q. While you were there at the bar, Mr. Kelly and Mr. Galen came in together, or don't you recall that?

A. Well, I don't recall it for sure; no.

Q. Well, you know that you didn't go in with either one of them.

Q. Well, I know I didn't go in with either one of them.

Q. Do you recall how many people were there at the bar?

(Testimony of Charles Brown.)

A. Well, the bar was pretty well filled.

Q. Judge Bourquin probably does not know the size of the bar there. Is it a good-sized bar?

A. Yes, sir; a long bar.

Q. You mentioned Mr. De Hart, Mr. Galen, Mr. Cowley. Now, do you recall Mr. Wheeler being there at that time, the prosecuting attorney?

A. Yes, Mr. Wheeler was there at the end of the bar.

Q. With whom?

A. Mr.—I think he was talking to Mr. Galen, that is my impression.

Q. Now, how did the invitation for a drink come up. Do you recall that?

A. Well, no, I don't believe I do.

Q. Had somebody else bought a drink before?

A. Yes, sir.

A. And had you partaken? A. Yes, sir.

Q. Do you know who it was? A. I do not.

Q. Simply a long line of people there at the bar, there was one drink bought, and the second one bought, and that was Mr. Kelly's, as you recall it?

A. Yes, sir. [25]

Q. Do you recall noticing whether Mr. Kelly invited Mr. Wheeler to drink at this time, too?

A. I don't know whether he invited him to drink.

Q. You didn't observe that? A. No, sir.

Q. Mr. Brown, prior to this trial, during the past year, had you ever taken drinks with Mr. Kelly before? A. Yes, sir.

Q. Quite often when you met him?

(Testimony of Charles Brown.)

A. Quite often, it is a practice that they have over there.

Q. It is a practice in your section? A. Yes, sir.

Q. What is the conversation when you meet over there, as a rule, between men like yourself and Mr. Kelly?

A. When we meet in town, it is, "How do you do? Come and have a drink." That is a fact. That is the practice, it is pretty near invariably, come in and have a drink.

Q. Mr. Brown, I wish you would tell the Court whether the buying of this drink for you had in any material way any influence upon your acting as a juror in this criminal case, that you were then trying? A. It certainly did not.

A. Did it occur to you at all when you were taking the drink that there was anything improper about it, or that it had any tendency to affect your judgment in any way? A. Absolutely not.

Q. When you took this drink, Mr. Brown, was it in your mind at all that Mr. Kelly was one of the attorneys for some of the defendants in that case, and in a different capacity from the Kelly that you had known over in Jefferson County? Did that occur to you at all?

A. No, it didn't occur to me. I blame myself for standing [26] around there in that way.

Q. How long did you stay there in the bar after you had this drink?

A. I turned right around and walked out. I thought I should not be in there, I just happened to

(Testimony of Charles Brown.)

think, I just turned around and walked right out.

Q. When this invitation to drink, did Mr. Kelly address it to you personally, Mr. Brown, to have a drink, or did he simply call everybody up at the bar to have a drink along the whole line there?

A. Well, just how he said it, I couldn't say.

Q. Well, as a matter of fact, he simply put a dollar on the bar, did he not, and said, "Everybody have a drink"?

A. He said, "Come on, boys, and have a drink." That would be my best belief, my best recollection.

Q. And didn't single you out, Mr. Brown, particularly? (No response.)

Q. Or Mr. De Hart, or anybody else? He simply says, "Come on, boys, let us have a drink"?

A. Yes, sir.

Q. You said you left the bar, and went out of the Placer bar-room as soon after as you had finished taking this drink? How long were you in there altogether when Mr. Kelly was there—do you recall that?

A. Well, a few minutes, very few minutes; I wouldn't say just how long, but—

Q. Who went with you, anybody go out with you?

A. I don't think anyone went with me.

Q. Did Mr. Kelly go out with you?

A. He did not.

Q. You left him with the others there at the bar?

A. Yes, sir. [27]

Q. Did Mr. Kelly talk to you at all in the bar-room

(Testimony of Charles Brown.)

on that occasion, unless you call this talking, this invitation to a drink?

A. Not that I can recall now; no.

Q. If anything was said at all, it was in the presence of all those there in the bar-room?

A. Yes, sir.

Q. Did you have any private conversation with Mr. Kelly on that occasion? A. No, sir.

Q. Were you alone with him at all? A. No, sir.

Q. And did you have any private conversation with Mr. Kelly, that is you and he alone; or substantially alone at any time during this trial?

A. I never did; no.

Q. Now, did you take a drink at any other time with Mr. Kelly during this trial? A. No, sir.

Q. That was the only occasion?

A. That was the only occasion.

Redirect Examination.

(By Mr. WHEELER.)

Q. Mr. Brown, you say you never had any other drinks with Mr. Kelly? Your recollection is pretty good as to what happened that evening, is it not?

A. Yes, sir.

Q. Now, so that there cannot be any mistake about what you did that evening let me repeat to you this question. Isn't it a fact that you stood out in the center of the lobby of the Placer Hotel, and that you talked with Mr. Kelly [28] for a period of from ten to twenty minutes, and that then you and Mr. Kelly walked into the Placer bar of the Placer Hotel, and isn't it a fact that the persons present, and the

(Testimony of Charles Brown.)

only persons present were Mr. W. D. Rankin, sitting over there (indicating), myself, Mr. Galen, Mr. Cowley and Mr. Kelly, and that Mr. Kelly came up to the bar, and put fifty cents down on the bar, or a dollar, and introduced you to Mr. Cowley, and then asked myself, Mr. Rankin and Mr. Galen to have a drink?

A. Yes, he did; he asked me to have a drink.

By Mr. EVANS.—Did you understand the whole of the question?

A. Yes. I am not answering the whole of the question.

Q. Now, isn't it a fact, Mr. Brown, that you stood out in the lobby of the hotel and talked to him for a period of ten to twenty minutes on that evening?

A. I am answering to the best of my ability, that is what I know, that is absolutely what I know, what I told you, what I say to you.

Q. You say you didn't talk to him during that night in the lobby?

A. I didn't talk to him during the trial.

Q. Didn't you talk to him on the evening when he bought you a drink in the Placer Hotel for a period of ten to fifteen minutes? A. No, sir.

Q. For a period of fifteen to twenty minutes?

A. No, sir.

Q. Didn't you see Mr. Homer Murphy in the Placer Hotel that evening?

A. I might have seen him.

Q. Didn't you see him talking to me at the time you were [29] talking there to Mr. Kelly?

(Testimony of Charles Brown.)

A. Well, it is hard to tell about those things; I couldn't say that—

Q. Now, Mr. Brown, don't you remember having talked to Mr. Kelly,—that Mr. Murphy stood talking to me, came in there, started to talking to me and stood about ten feet away from you in the Placer Hotel?

A. I might have saw Mr. Murphy around the hotel. I think I have saw him.

Q. Weren't you talking with Mr. Kelly, the evening when you saw him there?

By Mr. EVANS.—The witness answered several times as to his recollection. I object to this as repetition.

By the COURT.—What does the Court understand, if you answered to your best recollection, that you had no such talk?

A. According to my best recollection.

Recross-examination.

(By Mr. EVANS.)

Q. You were foreman of this jury, were you not, Mr. Brown? A. Yes, sir.

Q. You were selected foreman of this jury upon which you were sitting at that time? A. Yes, sir.

Q. Mr. Brown, the fact that you recall the circumstances of drinking with Mr. Kelly, the facts were brought to your mind how long ago?

A. The fact that I took the drink, you say?

Q. Yes, well, you have known of this proceeding, have you not, that there was some charges in connection with taking this drink? A. Yes, sir.

(Testimony of Charles Brown.)

Q. And did that come to your knowledge soon after [30] the trial, or two or three days afterwards?

A. Well, I don't remember the exact date.

Q. I will ask you if that set you thinking about what happened there at the time of the drink?

A. Yes, sir.

Witness excused. [31]

**Testimony of Homer G. Murphy, for the
Government.**

Whereupon HOMER G. MURPHY, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. Are you acquainted with Mr. Brown, the juror, the witness just upon the stand?

A. Yes, I am.

Q. Did you see him on the evening of the 24th day of January? A. I did.

Q. Where did you see him?

A. In the Placer Hotel lobby.

Q. And who was present there?

A. He was with Mr. Kelly there, talking to Mr. Kelly in the Lobby, and you and I were standing about ten feet away talking.

Q. For how long a period of time did he talk to Mr. Kelly then?

A. Fifteen to twenty minutes.

(Testimony of Homer G. Murphy.)

Q. Who, if anybody, was talking to him at that time?

A. Nobody, he and Mr. Kelly were alone.

Q. Did you see them leave that place at all?

A. No, sir, I went out; they were still talking when I went out.

Cross-examination.

(By Judge PIGOTT.)

Q. You are now, and were during the progress of this Sidebotham and Alderson case, an assistant district attorney? A. I am, and was.

Q. Did you prepare the information against these two defendants or contemnners?

A. Why, I assisted in the preparation of it, in the usual course of my duties. [32]

Q. Where were you standing or sitting in the lobby of the Placer Hotel on the evening of the 24th of January, when you say you saw Mr. Kelly in conversation with Mr. Brown?

A. Right about the center of the lobby. When I say the center, I mean the open space where the chairs are not occupied.

Q. You were with Mr. Wheeler at the time?

A. I came in and met Mr. Wheeler there.

Q. Did you have any particular business down there? A. I had with Mr. Wheeler.

Q. With Mr. Wheeler? A. Yes, sir.

Q. At the hotel? A. Yes, sir.

Q. Mr. Wheeler was staying at the hotel?

A. Mr. Wheeler was staying at the hotel.

Q. How far away were you from Kelly and Brown

(Testimony of Homer G. Murphy.)

when they were talking together?

A. Approximately ten feet.

Q. Of course, you had no trouble in seeing them?

A. No, sir; there were very few people in the lobby.

Q. Very few people in the lobby? A. Yes, sir.

Q. What day of the week was the 24th of January? A. I think it was Wednesday night.

Q. About what time of the evening were you there?

A. I couldn't say the exact time. I had been working at the office. I went down to see Mr. Wheeler about a matter that I was working on, and it must have been about ten o'clock in the evening; I couldn't say the hour, positively.

Q. How long had you been there before you noticed Kelly and Brown in conversation?

A. When I spoke to Mr. Wheeler they were standing there. [33]

Q. Did Mr. Wheeler call your attention to the fact that they were in conversation?

A. I don't think there was anything discussed particularly.

Q. Was it mentioned?

A. Not at that time; no.

Q. When did you first mention it?

A. The next morning when Mr. Wheeler told me he had seen Mr. Kelly buy Mr. Brown a drink.

Q. At the time you saw them talking, you said nothing to Mr. Wheeler about the fact that they were talking, nor did he say anything to you about

(Testimony of Homer G. Murphy.)

the fact that they were talking together?

A. I don't think there was.

Q. Could you hear what they said?

A. I couldn't hear what they said.

Q. They were not whispering?

A. I couldn't say, I couldn't hear anything, they were too far away.

Q. You don't know whether they were talking about this case or the war in Europe, do you?

A. No, sir.

Q. You haven't any idea about what they were talking about? A. No, sir.

Q. They were talking there in the lobby of the Placer Hotel? A. Yes, sir.

Q. Within ten feet of the district attorney, and his chief assistant, who were prosecuting the men then on trial before the jury of which Mr. Brown was foreman. That is a fact, is it not? A. Yes, sir.

Q. Do you know whether they saw you, or not?

A. I don't know whether they did, or not.

Q. Were they facing you? [34]

A. One was and the other was not.

Q. He could have seen you?

A. The one that was facing me.

Q. Who was facing you?

A. I think it was Mr. Kelly, I don't remember,— I think it was Mr. Kelly, as I recall it.

Q. Mr. Kelly knew Mr. Wheeler, and Mr. Wheeler knew him, and Mr. Kelly could have seen you if he was only ten feet away?

A. I assume he did, I don't know that he did.

(Testimony of Homer G. Murphy.)

Q. They didn't stop talking after you came in?

A. No.

Q. They didn't retire from that place to some other place in the room? A. No, sir.

Q. They didn't seem surprised or perturbed, did they?

A. I didn't pay much attention to them, I didn't look on their faces for surprise.

Q. What did you look for?

A. I didn't look for anything.

Q. Did it make any impression on you, seeing those two men talking together?

A. Not at the time, I didn't pay particular attention.

Q. It didn't occur to you at that time that there was any impropriety in Mr. Kelly speaking to his old friend, Mr. Brown?

A. Not right at that moment, it did not.

Q. It only occurred after you found out that Mr. Brown had lined up at the bar, and taken a drink with Mr. Kelly on that same evening?

A. Yes, sir.

Q. That was the only time?

A. That is when it occurred to me that it was improper.

Q. About the fact that these two men were talking openly in [35] the lobby within ten feet of you, as being improper, did that occur to you?

A. At that time I didn't think anything about it, because I was attending to some business with Mr. Wheeler.

(Testimony of Homer G. Murphy.)

Q. You saw them talking there? A. Yes, sir.

Q. The only thing that made you couple it together, thinking that might be improper, when taken as an entirety, was when Mr. Brown accepted this invitation from Mr. Kelly to take a drink, he being one of the crowd?

A. I wasn't thinking about it until I was told about Mr. Brown taking the drink the next morning, I then connected it up with their conversation in the lobby.

Q. Did you see Brown go in with Kelly?

A. No, I left before they went in.

Q. You don't know whether Brown went with Kelly, or not?

A. I left the corridor, and Mr. Wheeler was there, and Mr. Kelly, and Mr. Brown; I don't know where any of them went to, to my own knowledge.

Redirect Examination.

(By Mr. WHEELER.)

Q. That was during the time that the case of the United States vs. Alderson and Rae was on trial here in this court? A. Yes, sir.

Witness excused. [36]

Testimony of W. D. Rankin, for the Government.

Whereupon W. D. RANKIN, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name to the Court?

(Testimony of W. D. Rankin.)

A. W. D. Rankin.

Q. What is your business? A. Lawyer.

Q. Mr. Rankin, do you recall having seen the witness Brown in the Placer Hotel during the time that the case of the United States vs. Alderson and Rae and other was on trial here in this court?

A. I do.

Q. Who, if anybody, was present talking to him at the time in the Placer Hotel.

A. When I first saw him, he was talking with Mr. Kelly.

Q. And for about how long a time were they talking together.

A. I couldn't say. It was several moments. I was talking to you, and you remarked to me that Mr. Kelly was making a fool of himself talking to that juror, as I remember it; we stood there for several moments; I don't know how long it was.

Q. From there where did we go?

A. You and I went into the bar of the Placer and we joined Mr. Galen, the three of us drank at the bar.

Q. Now, who, if anybody, came into the bar while we were there?

A. Mr. Kelly and Mr. Brown walked into the bar.

Q. And where did they walk in the bar, from where were they coming from?

A. From the lobby.

Q. Now, after they got in there, who was present in the bar?

A. Well, the bar was generally filled, but you and

(Testimony of W. D. Rankin.)

Mr. Galen and I were at one end, and they were about the middle of the bar, [37] Mr. Kelly and Mr. Brown. I recall that because then after we had concluded drinking, Mr. Cowley, whom I had never met personally, stepped up to us, and suggested that, —intimated,—or requested that we drink, or something, and apparently the juror was close, and you said to us, or you said to Mr. Galen,—it was prior to that time,—that Mr. Kelly—Mr. Kelly was making a fool of himself in talking to that juror, and Mr. Cowley was about to invite us, and you said, that you wouldn't drink with the juror. I got out as quickly as I could, but apparently I didn't go out quickly enough, because I didn't *was* to be present.

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Rankin were you interested in this case at the time?

A. Not the slightest at that time. I am now attorney for Mr. Sidebotham and Mr. Wilmot.

Q. Were you taking any part in it at that time?

A. I had taken an interest to this extent, that I had discussed the case rather generally. In fact, Mr. Wilmot had talked with me earlier in the case about appearing for him on a motion for a continuance, and I had taken an active interest from the inception of the case, in the case, in a general way, partly politically, and just in a general way.

Q. When was this talk with Mr. Wilmot, or negotiations with Wilmot about your becoming an attor-

(Testimony of W. D. Rankin.)

ney before the trial started?

A. Oh, long before. That was in the summer about the time that there was to be a postponement, and he then discussed with me the idea of appearing for him, and Mr. Sidebotham in obtaining a continuance of the case in the summer, that was several months before the trial.

Q. You were not connected with it in any way during the trial? [38] A. Not in any way.

Q. Did you confer with Mr. Wheeler during the trial?

A. I talked with him a number of times, and had lunch with him a number of times during the trial, and talked to him often.

Q. About the case?

A. Yes, we discussed the case often.

Q. And discussed the evidence?

A. I don't think we discussed the evidence in particular, we discussed, I imagine, generally everything and anything about the case.

Q. Were you assisting him?

A. Not in any way whatever.

Q. Making any suggestions about the course that he shall take, or was taking?

A. No. I think I made no suggestion at all as to any procedure, I was a friend of Mr. Wheeler's, and talked with him a lot about the case, and I might say that I was sympathizing with him in his efforts, I might—

Q. To convict the defendants?

A. Not any particular defendants. I figured that

(Testimony of W. D. Rankin.)

he was making a single-handed fight. He was a friend of mine as much as anything, when I had associated with him as a matter of encouragement, I was with Mr. Wheeler, and had been in this sense in the fight generally that I felt he was making. I felt more or less that the men were classified. I figured that the big influences were against him generally, just in a general fight that existed in this state. I am a sympathizer with him in that sense; outside of that I had no desire to see anybody in the case convicted. In fact, I had a good deal of sympathy. My sympathy, however, was with the prosecution in an general sense. In fact, I had a good deal of regret that Mr. Alderson and Mr. Rae should be in this matter, but my friendship for Mr. Wheeler and the fight that he was making, my sympathy was absolutely with him. [39]

Q. And you had some regret at the outcome of the trial?

A. I had regret at the outcome in this sense, that from what I heard of the case, that if the evidence were to be believed, I had in mind generally that the verdict should have been more general from a technical standpoint. It was a matter of a great deal of delight to me that Mr. Alderson and Mr. Rae were acquitted.

Q. And you felt also that the other two defendants should have been acquitted too?

A. I had the feeling from a superficial acquaintance. I must say I knew very little of this case from a technical standpoint, almost none, not enough to

(Testimony of W. D. Rankin.)

pass an opinion on the matter. I did feel that it was exceedingly stiff on these particular defendants shouldering the blame, it occurred to me, but the whole matter was one of regret to me. My standing with Wheeler as a matter of sympathy, was a sympathy for him, and the fight generally that he made in this State. I felt that he was entitled to encouragement. As far as assisting him, I had nothing to do with it, and repeat I was delighted that Alderson and Rae, whom I have known were free from any suffering of any kind in the matter.

Q. You took a very broad view of the whole thing?

A. Yes, I did, I think I did. That is my idea about the matter.

Q. You are now acting as Sidebotham and Wilmot's attorney? A. Yes.

Q. Two of the defendants that were convicted?

A. Yes, sir; I am acting as attorney for Sidebotham and Wilmot. I regret exceedingly that I am called here, or have anything to do with this matter.

[40]

Q. Yes, we observe that, Mr. Rankin, how strong was and is your friendship with Mr. Wheeler, how intimate?

A. It has been quite intimate for quite a time. Those of us, I feel that those of us who have been fighting on the anti-company side, so to speak, as I have felt we have been fighting, are naturally associated together in sympathy, not in any personal feeling of antagonism toward other, but as a matter of survival, if you like. We have been closely asso-

(Testimony of W. D. Rankin.)

ciated, quite a number of us throughout the state.

Q. You mean by that those of you who have been fighting on the anti-company side, you mean by that, the matter of making your main living on the personal injury cases?

A. Not alone that, or not that in any sense, because those that have been fighting politically are just as intimate, and I feel that the personal injury side of it, as an incident we feel that we are fighting for the State.

Q. The personal injury litigation is not an incident to you in your business, it is the main part of your law practice, isn't it?

A. No, sir; it is not. One time it was, it is not at this time and was not I think, prior to the passage of the compensation act. It was not a matter of the main part, when you say the main part I am satisfied that it was not the main part of my business financially.

Q. When you went into the lobby that night, did you and Mr. Wheeler go in together, or did you go in and join him there?

A. No, sir; we walked in together. My desire was to get away from the whole thing.

Q. When you went into the lobby?

A. I don't remember, we didn't walk in together.

[41]

Q. Was Mr. Murphy standing there?

A. I didn't see Mr. Murphy. I didn't think anything of this incident of the lobby. It was perfectly in the open, perfectly plain, right in the center, I

(Testimony of W. D. Rankin.)

never would have thought of it, if Mr. Wheeler had not spoken to me of it.

Q. They were standing how far from you?

A. They were perhaps the width of this room. We were over near the fountain, and they were in the center, right in plain sight.

Q. Were more than ten feet away.

A. Oh, yes; I think at least the distance of this room.

Q. You were in plain sight?

A. Oh, yes; perfectly plain.

Q. Mr. Murphy wasn't there?

A. I don't remember seeing Mr. Murphy; I don't remember.

Q. Did you know Brown at that time?

A. No, sir,—because I was with Mr. Wheeler, I don't remember seeing him on that evening. But I might have, I don't remember.

Q. Did you know Brown at that time?

A. No, sir.

Q. Did you know him at that time?

A. No, sir; except by sight.

Q. Did you recognize Brown as a juror?

A. I don't think I would have if Mr. Wheeler had not called it to my attention. I did then. When he did call it to my attention I then recognized his face, but I had never met him.

Q. Did he call it to your attention right there?

A. Right there in the lobby, and that was one reason I was anxious to get away from there, because Mr. Wheeler seemed to be exercised. [42]

(Testimony of W. D. Rankin.)

Q. Why should that particularly embarrass you?

A. Well, because I feared that something would come up about the matter, I didn't care to be into the thing.

Q. You went into the bar with Mr. Wheeler?

A. Yes, sir.

Q. Now, are you positive at all about the details of this incident at the bar?

A. I am very positive, because I had a good deal of,—I was considerably disturbed and regretted exceedingly that I was in that situation, in fact, as you will learn, there was a good deal of conversation about this incident right at the time at the bar.

Q. Was Mr. Cowley in the bar when you went there? A. I didn't see him.

Q. Who were there when you went in. Mr. Wheeler and yourself?

A. I don't recall a single party, except Mr. Galen and Wheeler and myself.

Q. Mr. Galen?

A. Mr. Galen didn't go in there with us. As I recollect, the three of us, as I recall distinctly, drank together.

Q. When you went there, can you tell us anybody that was in the bar. A. Not a soul.

Q. And you don't know whether Mr. Galen was there, or came in after you and Wheeler?

A. I first recall Mr. Galen as the three of us stepped together about the time we went in there. I think we stepped up there together.

Q. Was Cowley there then?

(Testimony of W. D. Rankin.)

A. I didn't see him. [43]

Q. When Kelly and Brown came in, was Cowley there?

A. I didn't see him at that time, I think he was standing by us, but I am not certain about that.

Q. Was Mr. De Hart there?

A. He might have been there; I didn't see him; I don't recall seeing him.

Q. What way did Kelly and Brown come into the bar?

A. The way I noticed it, Wheeler said,—remarked to us that they were about to drink, and that is how I noticed them walking from the door toward the bar.

Q. He remarked that they were about to drink?

A. That Kelly was drinking with that juror.

Q. Before they got up to the bar?

A. Or about to drink, I don't remember the exact words.

Q. Before they got up to the bar?

A. Before they got up to the bar it was on his mind, and he was disturbed prior to that time, before we ever walked into the bar.

Q. He said Kelly and that juror are going to drink, before they ever got to the bar?

A. Something about it, I am not positive of that.

Q. Now, on your direct examination, you said the remark that Wheeler made, as I understood you, that Kelly was making a damn fool of himself talking to the juror?

A. He said to Mr. Galen and to me. I remember

(Testimony of W. D. Rankin.)

him making that remark about the juror. I noticed that he was disturbed.

Q. He said in addition that Mr. Kelly is going to drink with that juror?

A. No, not then, but a moment or two later.

Q. Which was a moment or two later? The drink remark, [44] or the other?

A. They were both drink remarks, but when they first came in Wheeler made some comment about their going to drink, or something, made some remark about the juror, so at that I turned around and looked at them, and then he said to Mr. Galen a moment or two later, what I said first, making a fool of himself.

Q. Are you sure that Mr. Galen was at the bar when Kelly and Brown came in?

A. Yes, I am positive of that.

Q. Did Kelly buy you a drink, or offer to?

A. No, if he did I didn't hear him, we had completed this drink, as I say.

Q. Who bought the drink?

A. When we were in?

Q. Yes. A. I don't remember.

Q. You don't remember? A. No, sir.

Q. Did Mr. Wheeler?

A. He may have, or I may have, or Mr. Galen may have.

Q. Does Mr. Galen drink.

A. That is my recollection that we three drank. We may have had one drink before Mr. Galen joined

(Testimony of W. D. Rankin.)

us. I am satisfied that the three of us drank together.

Q. Now, did Kelly invite Wheeler to drink too?

A. I don't know. I didn't hear him invite him. He may have. I didn't hear it, but as I said before, the incident that drove me out of the bar, was when Mr. Cowley, as I understood, was just inviting the group generally. I had never met Mr. Cowley. Mr. Cowley invited us to take a drink [45] I remember distinctly Mr. Wheeler making the remark, "I won't drink with a juror, or something, and I got out of there right away, because I knew,—I feared something coming up, and I got away from it.

Q. You didn't get out soon enough?

A. No, apparently not; I left Mr. Wheeler and the others there. I went out alone.

Q. There were, at least according to your statement, there were at least six persons at the bar, besides the bartender behind it?

A. Oh, I would think there were a lot more than that.

Q. Mr. Kelly came in openly with Mr. Brown?

A. Absolutely, nothing could have been more open.

Q. Yet, the incident was such that you felt it was very embarrassing to stay there?

A. The incident itself,—it was called to my attention. Mr. Wheeler was exercised in the lobby; he was exercised at the bar, and knowing that, I was exercised enough to get away, and very quickly.

Witness excused. [46]

Testimony of E. W. Byrne, for the Government.

Whereupon E. W. BYRNE, a witness called and sworn on behalf of the Government, testified as follows.

Direct Examination.

(By Mr. WHEELER.)

Q. You are a special agent in the Department of Justice? A. I am.

Q. Your full name is E. W. Byrne?

A. It is.

Q. You reside in Butte? A. I do.

Q. Are you acquainted with Mr. Daniel M. Kelly?

A. I know Mr. Kelly by sight only.

Q. Do you know Mr. Alderson and Mr. Rae?

A. By sight.

Q. Are you acquainted with Mr. Galen?

A. I know him by sight.

Q. Acquainted with Mr. Speer?

A. I know him also by sight.

Q. And what have you to say with reference to whether or not you are acquainted with Mr. W. B. Warner, who was a juror in the trial of the case of the United States vs. A. M. Alderson and others?

A. I knew him by sight during the pendency of this trial.

Q. Did you see him in the lobby of the hotel at any time during the trial of the case? A. I did.

Q. When was that if you know?

A. On the evening of January 25th.

Q. Just tell us what occurred there on that occasion?

(Testimony of E. W. Byrne.)

Q. On the evening of January 25th at approximately 7:30 P. M. Mr. Kelly was standing by the cigar counter in the lobby of the Placer Hotel conversing with some gentlemen whom I did not [47] know. At that time Mr. Warner approached Mr. Kelly, and some conversation occurred which I did not overhear. Warner then walked away some five or six paces, and removed from his pocket a typewritten document which he proceeded to read. He was occupied for perhaps three or four minutes. He then turned to a position close to Mr. Kelly, and resumed the conversation. In the course of that conversation I heard remarks in substance as follows: Warner evidently wished to see Mr. Kelly, Mr. Kelly was engaged at that time, and told Mr. Warner that he could see him later, that he would be around the hotel lobby most of the evening. At that time, Mr. Warner said, "All right; I will see you later," and walked off. Nothing further occurred for, I should say perhaps an hour. At that time a large crowd was assembling in the lobby of the hotel. A fur auction was taking place, and Warner took a seat approximately in the rear of the fur auctioneer. At that time Mr. Galen approached Mr. Warner. Warner showed Galen a typewritten document, which I presume was the same one heretofore mentioned, and some slight conversation occurred. Galen then walked away after conversing with Warner for perhaps two or three minutes. I don't know what the subject of this conversation was. Several minutes later while

(Testimony of E. W. Byrne.)

Warner was till seated in the same position, Mr. Callaway, one of the attorneys for the defense, accompanied by Mr. McDonald, I believe, approached Mr. Warner, and several words passed. They were not there more than a moment. Thence approximately twenty or thirty minutes later than that time, the fur auction having been completed, Mr. Kelly was standing about in the center of the open portion of the lobby of the Placer Hotel and Warner again approached Mr. Kelly after having casually [48] spoken to Mr. Speer for a moment, he then produced this typewritten document which I presume was the same document heretofore mentioned, and handed it to Mr. Kelly, and a conversation rather earnestly was carried on for perhaps ten minutes, or possibly fifteen minutes. I didn't hear the subject of this conversation. Warner thereupon took the document from Kelly and walked out of the hotel, and met jurors numbers one and twelve, and was with them for an indeterminate period of time.

Q. When you speak of jurors one and twelve, you mean the gentlemen who were sitting in the case?

A. The gentleman who was sitting in this seat, and the one immediately back of it, (indicating juror chairs next to the bench.)

Cross-examination.

(By Judge PIGOTT.)

Q. Mr. Byrne, how long have you been in the employ of the United States Government?

A. Something over five years.

Q. You are a detective for the United States

(Testimony of E. W. Byrne.)

Government? A. No, sir.

Q. What are you?

A. I am a special agent of the Department of Justice in charge of this particular district.

Q. Were you in consultation with the United States Attorney's office for this district during the progress of this trial? A. I was.

Q. Were you ordered by the Department of Justice, or by the United States Attorney for this district to watch the jurors, and watch the attorneys for the defense?

A. I received no definite orders. It is the general understanding; [49] I being situated so far from Washington, I am to do such matters as I deem proper in furtherance of all prosecutions, and towards the end of justice, so far as the United States is concerned, and Mr. Wheeler had so suggested by co-operation.

Q. And you were watching the jurors, and the attorneys for the defense?

A. I was not at this particular time watching anybody particularly. The matter came up so that I deemed it advisable.

Q. You did no detective work in this case at all?

A. No.

Q. What were you watching?

A. Any conduct which I deemed suspicious or worthy of note.

Q. Well, was it a part of your business to scrutinize the conduct of the jurors, and the attorneys for the defense?

(Testimony of E. W. Byrne.)

A. My duties are very broad, and indeterminate. If I see anything which I think concerns the Government, and the administration, I do scrutinize it most closely.

Q. And you watch, and you did watch in this particular case the conduct of the jurors, and the attorneys for the defendants day by day, did you not?

A. No, sir.

Q. What were you doing if you were not watching the conduct of the case, and the jurors, and the defendants' attorneys? Well, what were you doing then as the agent of the Government, of the Department of Justice, if you were not watching the conduct of the case, and the jurors, and the defendants?

A. Your question is rather indefinite. You mean what was I doing at that particular time on that particular evening?

Q. My question is: What were you doing with respect to this case, if you were not watching the conduct of the witnesses, the [50] jurors, and the attorneys for the defendants?

A. My duties are rather general. I was doing various matters in connection with this case, assisting the United States Attorney in any manner which I deemed proper, and which he might request.

Q. Now, you were in the Placer Hotel, you say, on the evening of the 24th of January? A. 25th.

Q. 25th of January about 7:30 o'clock P. M.?

A. Approximately that time.

Q. Did you take notes of all these things that you have been telling us about?

(Testimony of E. W. Byrne.)

A. Yes, I made a note at that time,—no not at that time, later I made notes.

Q. How much later did you make those notes?

A. I made notes, I think, well, at that time, I jotted it down on the back of an envelope, just briefly certain notes, and I think two days later I made a more complete and full statement.

Q. What did you do with that paper?

A. What paper?

Q. What did you do with the notes you made?

A. On the back of the envelope?

Q. Yes.

A. They were destroyed.

Q. Did you transfer those notes in substance to something else?

A. Those notes were merely brief memoranda, and a more complete report was prepared.

Q. I was mistaken—

A. Those notes were merely brief memoranda of the time and names of the parties. A more complete report based upon those and amplified was prepared.

[51]

Q. What did you do with it?

A. The notes?

Q. The notes—no, the memoranda, the amplified memoranda?

A. I have copies of that.

Q. You gave the original to Mr. Wheeler.

A. I gave a copy to Mr. Wheeler.

Q. When?

(Testimony of E. W. Byrne.)

A. At the time it was made, I believe, two days later.

Q. Now, Mr. Byrne, you saw Mr. Warner approach on these several occasions Mr. Kelly and Mr. Galen with this typewritten paper?

A. I saw Mr. Warner approach Mr. Kelly. I saw Mr. Galen approach Mr. Warner.

Q. Oh, you saw Mr. Galen approach Mr. Warner?

A. Yes, sir.

Q. Who was with Warner at the time Mr. Galen approached him?

A. I don't know that Mr. Warner approached anyone. There was quite a crowd there. There was some gentlemen seated by the side of Mr. Warner, I don't know, I don't know that Warner was with him, or not, I don't think he was.

Q. You know Mr. Alderson?

A. By sight.

Q. Wasn't Mr. Warner talking to Mr. Alderson at the time Mr. Galen approached Mr. Warner?

A. I don't believe that he was. This gentleman sitting beside him, I don't know who he is, but I have seen him around the lobby a great deal. At the time Galen approached Warner the fur auction was in progress. Alderson may have approached at that time, I wouldn't be positive of that.

Q. You don't know what this typewritten paper contained, do you?

A. No, sir, I do not.

Q. And you don't know what these men were talking about, do you? [52]

(Testimony of E. W. Byrne.)

A. Only in so far as I have testified, the subject of their conversation.

Q. Was the word "bill" mentioned?

A. Not in my hearing at all. The only part of the conversation which I overheard was the appointment being made between Mr. Kelly and Mr. Warner in their conversation, and such other conversation as took place I didn't overhear.

Q. Didn't Mr. Kelly say,—to refresh your memory, didn't Mr. Kelly say to Mr. Warner in substance that he couldn't talk to him at that time?

A. Approximately that, or he was engaged. He was conversing with some gentleman whom I did not know.

Q. Now, all this talk was open, not secret, in the lobby of the Placer Hotel. All that you saw was open, not secret, there was no whispering was there?

A. So far as I could see there was no particular whispering.

Q. There was nothing secretive about it that you could see?

A. Nothing that appeared to me that would be particularly secretive.

Q. You never heard this case mentioned by any of these men?

A. I couldn't have heard it if it had been mentioned, unless it was mentioned at this moment, at the particular time of the interview.

Q. You did not, as a matter of fact hear anything said about this case, did you? A. No, sir.

Q. How far were you away from these men when

(Testimony of E. W. Byrne.)

they were talking at the time that you say you heard Mr. Kelly say he could not talk with him then; but might talk with him later?

A. I was probably eight or ten feet approximately, standing with Mr. Houston at that time. [53]

Q. Who is Mr. Houston?

A. He is a special accountant for the Department of Justice.

Q. Did you move up, or did you move away from these men when you heard this conversation you just related? A. I did neither.

Q. You didn't move up closer to hear them at any time? A. No, sir.

Q. Did Mr. Warner hand Mr. Kelly this typewritten paper? A. When?

Q. Any time? A. Yes, sir.

Q. What did Mr. Kelly do—look at it, and turned it back to him?

A. He held it for some few minutes. Part of the time he was reading it, and part of the time he was talking.

Q. You don't know whether that was a legislative bill that Mr. Warner was desirous of having introduced?

A. I don't know what the document was except that it was some typewritten document of several sheets.

Q. You don't know of course, whether it is a fact or not that Warner went to Kelly and Galen at the suggestion of Senator Williams of Deer Lodge County, he recommending Warner to go to them as

(Testimony of E. W. Byrne.)

former attorneys general who knew a great many members of the legislature?

A. I know nothing about that.

Q. You know nothing about that?

A. I know nothing about that, although I believe Mr. Warner at a subsequent time did make some mention of it, but they are totally disconnected with the facts that I testified to. [54]

Q. You were present in Mr. Wheeler's office when Mr. Warner was taken up there and examined by Mr. Wheeler? A. A portion of the time.

Q. How many interviews were you present at when Mr. Wheeler was examining Mr. Warner?

A. Well, so far as I know, I was only in the room on one occasion; I was in and out of the room several times. On one occasion I am unable to say what portion of the interview I overheard, and what portion I did not.

Q. Were you there at the first interview?

A. No, sir; Warner was in the room for some time with Mr. Wheeler before I entered the room.

Q. Did you hear any of the talk that Mr. Wheeler made to Mr. Warner at the time he was up there examining him?

A. The conversation was rather general in the room at that time.

Q. Did you hear Mr. Wheeler say anything to Mr. Warner? A. Yes, I heard a conversation.

Q. About what he would do to him?

A. No, I don't—

Q. Unless he came across?

(Testimony of E. W. Byrne.)

A. I don't recall that any threats were made by Mr. Wheeler in my presence.

Q. Never mind the threats.

A. You intimated threats,—I am using plain language, plain English.

Q. You answer the question, Mr. Byrn, if you please. Did you hear Mr. Wheeler say to Warner, you know, or did you,—did you not hear Mr. Wheeler say to Mr. Warner in your presence: "Did you not go into the bar with Galen, with Albert Galen, and take a drink with him?" To which Mr. Warner answered, "I did not." Mr. Wheeler saying to Mr. Warner, "You are a God damn liar." Did you hear that? [55]

A. I wouldn't say positively that I heard those words. I know at one or two times during that interview there was some rather tense words.

Q. Did you hear Mr. Wheeler say that to Mr. Warner, that, or in substance that?

A. I don't know whether he used those words, but rather warm language.

By the COURT.—The District Attorney, of course, is not objecting. But is it proper cross-examination?

By Mr. WHEELER.—It is not proper cross-examination.

By the COURT.—You can bring it out at a later time. This witness will remain in attendance upon the court.

Witness excused. [56]

**Testimony of Mrs. H. P. Umpsen, for the
Government.**

Whereupon Mrs. H. P. UMPSEN, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name.

A. Mrs. H. P. Umpsen.

Q. Where do you live? A. San Francisco.

Q. You are a sister of Mr. Sidebotham?

A. I am.

Q. Are you acquainted with Mr. Dan Kelly?

A. I am.

Q. Did you ever have any conversation with him?

A. Yes, sir

Q. Did you have any conversation with him with reference to your brother taking the witness-stand in the case of the United States against Alderson and Sidebotham and others?

A. I did. I asked his advice?

Q. How? A. I asked his advice.

Q. What was his advice?

By Mr. METTLER.—Just a moment. We object to this as incompetent evidence. If the relation of attorney and client existed, as appears from the testimony of this witness, the communication was privileged. It is immaterial and incompetent.

By the COURT.—On the face of it, it would appear privileged. You better reframe your question.

Q. Mr. Kelly, as I understand it, was not your at-

(Testimony of Mrs. H. P. Umpsen.)
torney, or the attorney for Mr. Sidebotham?

By Mr. METTLER.—We object to the question as leading and suggestive to this witness. [57]

By the COURT.—I don't know what particular relations existed at the time. If she asked his advice as an attorney. The objection to the last question will be overruled even if it is leading, it may be asked.

By Mr. METTLER.—Note our exception.

By the COURT.—It may be noted.

Q. Mr. Kelly, as I understand it, was not your attorney or the attorney for Mr. Sidebotham?

By Mr. METTLER.—We also object to that as irrelevant, immaterial and incompetent.

By the COURT.—Objection overruled.

By Mr. METTLER.—Note our exception.

By the COURT.—She may answer the question.

A. He was not.

Q. And what was his advice with reference to your brother going on the witness-stand?

By Mr. METTLER.—We desire the same objection entered to all of this line of questioning, and we will have the same ruling and the same exception.

By the COURT.—Yes.

Q. What did he say to you with reference to your brother going on the witness-stand, if anything?

By the COURT.—Do you interpose the same objection?

By Mr. METTLER.—The same objection.

By the COURT.—This is a matter worth arguing, if you want to argue it. The Court would like to

(Testimony of Mrs. H. P. Umpsen.)

hear it. The question is whether or not there is privilege there.

By Mr. METTLER.—There are two features of this. The one which your Honor has suggested, that is, that this witness' sworn testimony is that she asked his advice. He is charged as an attorney. The testimony shows that she is related [58] to one of the defendants, as your Honor knows. The record shows that all of these defendants were tried jointly. What was of interest to one was of interest to all. So that her conclusion, she being a layman, that Mr. Kelly was not acting as her attorney, that is a conclusion improper to be drawn by this witness; but to be drawn from the facts, not only the facts proven by this witness, but by the facts appearing of record in this court. She having asked his advice in the matter.

By the COURT.—Well, do you take the stand that she was his client for the time being?

By Mr. METTLER.—Yes.

By the COURT.—She has the right to waive her privilege.

By Mr. METTLER.—But Mr. Kelly has not waived it.

By the COURT.—Oh, no; the privilege of the client.

(By the COURT.)

Q. Are you willing to testify?

A. Am I willing to testify?

By the COURT.—Yes.

(Testimony of Mrs. H. P. Umpsen.)

A. I think my testimony will gain nothing either way.

(By the COURT.)

Q. Assuming that these were the conditions. That you were really a client of Mr. Kelly's and that he was your attorney. Assuming that that was so, would you still be willing to testify, you having the privilege to deny to do so, if you were really a client of his?

A. I considered that he was giving me his advice as a lawyer. Of course, I don't know much about it. I don't know whether I was his client or not.

Q. The Court asked, are you willing to waive the privilege of a client, and testify in court, or are you not? [59]

A. Yes, I am willing to.

By the COURT.—The objection will be overruled.

By Mr. METTLER.—May I add, your Honor, to the other objections that we made, that this testimony is irrelevant and immaterial upon the charge as before the court at this time, there being nothing in the charges which would apprise us of any relations with this lady, or any testimony which she might give in connection with this matter. I don't see any relevancy. Of course, we cannot tell, I cannot see where any advice which was given would affect the main question.

By the COURT.—It might. It is assumed that the District Attorney would not bring something forward that is not material. It might. The Court cannot tell. If it is harmless, the Court will so find

(Testimony of Mrs. H. P. Umpsen.)

it, and pay no attention to it. The objection will be overruled.

By Mr. METTLER.—Note our exception.

Q. What did he say to you with reference to your brother going on the witness-stand, if anything?

A. Well, I am not quite sure what he said, because it was the advice of everyone for him not to go on the stand.

By the COURT.—Your best recollection.

(By Mr. WHEELER.)

Q. You talked with Mr. Kelly, didn't you, Mrs. Umpsen, on several occasions? A. Yes, I did.

By Mr. METTLER.—We object to counsel asking this witness leading questions.

By the COURT.—It is merely preliminary. Objection overruled.

By Mr. METTLER.—Note our exception.

Q. And what was the substance of what he said, if anything, with reference to your brother taking the witness-stand, [60] and as to whether or not it was necessary for him to take the witness-stand?

By Mr. EVANS.—We object to that as leading. She has already answered.

By the COURT.—Objection overruled.

By Mr. EVANS.—Note our exception.

A. Well, as I recall, all the advice was that he should not go on the witness-stand?

Q. And what reason, if any did he give as to why he should not go on the witness-stand?

By Mr. FRANK WALKER.—We object to that as being immaterial. I cannot see that any testimony

(Testimony of Mrs. H. P. Umpsen.)

that would be brought forth from that would have any provative effect here, as to whether Mr. Sidebotham should go on the witness-stand or not.

By the COURT.—It might. Objection overruled.

By Mr. WALKER.—Note our exception.

A. He seemed to think it was better for no one to go on the witness-stand.

Q. What reason did he give why it was better for no one to go on the witness-stand?

A. They thought it was better for the case.

Q. What, if anything, was said with reference to the jury?

A. Mr. Kelly never mentioned the jury to me.

Q. He didn't mention the jury? A. No, sir.

Q. Was it mentioned in your presence with reference to the jury by Mr. Kelly?

A. No, sir; Mr. Kelly never mentioned the jury to me.

Q. Did anybody else mention the jury to you in Mr. Kelly's presence?

Mr. METTLER.—Object to that as immaterial and irrelevant, and [61] incompetent.

By the COURT.—It might not be. Sometimes a failure to speak, or silence, may be significant. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. I don't recall ever having spoken of the jury in Mr. Kelly's presence.

Q. You had a conversation, did you, with some of the defendants with reference to the jury, or some of the defendants' lawyers?

(Testimony of Mrs. H. P. Umpsen.)

A. Yes, we discussed whether or not how the jury was going to stand, what we thought about it.

Q. And was that in the presence of Mr. Kelly?

A. I don't recall of it ever having been in the presence of Mr. Kelly.

Q. You talked with a number of the attorneys in reference to the jury, and how it stood?

A. Yes, sir, as to how we thought it stood.

Q. As to how you thought it stood?

A. Yes, sir.

Q. And what, if anything, was said by the defendants, or any of the defendants with reference to how the jury stood?

By Mr. METTLER.—We object to that because Mr. Kelly has been eliminated by this witness; she said there was never anything said in the presence of Mr. Kelly about the jury. What might have been said in the presence of the other defendants, not in the presence of Mr. Kelly, would certainly not be binding upon Mr. Kelly. The testimony would be incompetent, irrelevant and immaterial, for any purpose whatsoever.

By the COURT.—The objection will be sustained.

Q. Now, was anything said with reference to how the jury stood, in the presence of Mr. Galen? [62]

A. No.

Q. To refresh your memory, I will ask you if you gained the impression, did you, that the jury was all right?

By Mr. METTLER.—Just a minute. We object to that as being manifestly improper, and the Dis-

(Testimony of Mrs. H. P. Umpsen.)

trict Attorney should know it. It is asking this witness a conclusion not gained from any conversation either with Mr. Galen or Mr. Kelly, the only two charged here. It is objected to as incompetent, irrelevant and immaterial for any purpose whatsoever. I think it is merely preliminary, but the objection to the form of the question will be sustained.

Q. I will ask you, Mrs. Umpsen, if you were not given to understand,—to refresh your memory,—that the jury was all right, or that some of them were favorable to the defendants?

By Mr. METTLER.—We object to that on the same grounds, that it is not connected in any way with the two defendants who are charged here, and it is indefinite, given to understand, not stated by whom, whether by her brother, or persons not all connected with these two defendants. It is incompetent, irrelevant and immaterial for any purpose whatsoever.

By the COURT.—The objection will be sustained.

Q. Now, you stated on these several occasions that you had these talks with Mr. Kelly, that he always advised you not to put your brother on the witness-stand, or not to permit him to be put on the witness-stand. Is that correct?

By Mr. METTLER.—We object to that as leading.

By the COURT.—She may answer the question.

A. I am not sure that we discussed that always.

Q. Well, on several occasions, Mrs. Umpsen?

A. I think so. I think that was the understanding.

(Testimony of Mrs. H. P. Umpsen.)

Q. Isn't it a fact that your brother was very anxious to [63] take the witness-stand?

By Mr. METTLER.—Just a moment.

By Mr. WHEELER.—That will be followed up. This is merely preliminary.

By Mr. METTLER.—We object to that as incompetent, irrelevant and immaterial, since her brother is not a party to this proceeding, and it is not shown that these defendants or either of them were present at the time this took place.

By the COURT.—Objection overruled.

By Mr. METTLER.—Note our exception.

A. My brother was very anxious to go on the witness-stand.

Q. At all times. A. At all times.

By Judge PIGOTT.—If the Court please, on behalf of the defendants I move to strike out the last answer of the witness for the reason that it is impossible for her to know whether her brother was anxious to go on the witness-stand. It is purely hearsay.

By the COURT.—Oh, yes; it is a part of the *res gestae*, it is only preliminary, and it is harmless, if it leads to nothing material. The motion will be denied.

By Judge PIGOTT.—Note our exception.

Q. I will ask you, Mrs. Umpsen, if you don't know that he was urged to be kept off of the witness-stand by the attorneys for the defendants, and some of the defendants, and particularly by Mr. Galen and Mr. Kelly?

(Testimony of Mrs. H. P. Umpsen.)

By Mr. METTLER.—We object to that as irrelevant and immaterial to any issue before us, and furthermore, as being hearsay on the part of this witness; also leading and generally objectionable. It calls for hearsay testimony, not binding upon these defendants, not by any one in their presence. We [64] would ask to have the question divided.

By the COURT.—Objection overruled.

By Mr. METTLER.—Exception noted.

By the COURT.—Motion denied.

By Mr. METTLER.—Exception noted.

By the COURT.—Now, you will answer the question.

A. Now, I don't know—I don't remember particularly Mr. Kelly and Mr. Galen; but that was the general advice of all of the attorneys. I don't think I ever talked to Mr. Galen about it.

Q. Now, let me ask you. You were present in court the morning the case was started to be tried, were you not, the morning the jury was selected?

A. No, sir; I was not in the courtroom,—oh, yes; I was here.

Q. And prior to that time, had you ever seen a jury list?

By Mr. METTLER.—We object to that as being irrelevant and immaterial for any purpose whatsoever.

By the COURT.—Well, then, it will be harmless. Objection overruled.

By Mr. METTLER.—Note our exception.

Q. Had you ever seen a jury list prior to that

(Testimony of Mrs. H. P. Umpsen.)

morning? A. Yes, sir.

Q. Where had you seen it?

By Mr. METTLER.—Objected to on the same grounds.

By the COURT.—Overruled.

By Mr. METTLER.—Note our exception.

A. Mr. Smith, Judge Smith, gave it to me.

Q. Judge Smith gave it to you?

A. Yes, sir.

By Mr. METTLER.—We move to strike out the answer because Judge Smith is not on trial here.

[65]

By the COURT.—Motion denied.

By Mr. METTLER.—Exception noted.

Q. When was it. How long prior to the time of the empanelling of the jury was it that you saw that list?

A. I am not quite sure, either Friday night, or Saturday morning.

By Mr. METTLER.—The same objection may go to all this line of testimony, and the same ruling and exception.

By the COURT.—Yes.

Q. Did you have a conversation with any of the defendants in the case with reference to the jury list?

By Mr. METTLER.—We object. The defendants, these two men on trial are not defendants, I take, it means the defendants in the other case, not in this case.

By the COURT.—I don't think that is material.

By Mr. WHEELER.—It is for the purpose of

(Testimony of Mrs. H. P. Umpsen.)

showing, may the Court please, that the first conversation she had was with one of the defendants that was on trial at that time, for the purpose of showing,—particularly Mr. Alderson, for instance, had a copy of the jury list.

By the COURT.—She may answer. Overruled.

By Mr. METTLER.—Note our exception.

Q. Did you have a conversation with Mr. Alderson with reference to a jury list?

A. I did; yes, sir.

Q. When was that?

A. I think it was Friday afternoon or Saturday morning.

Q. And whereabouts? A. On the street.

Q. And was anything said to you, did you ask him for the jury list, or what was said. Just tell us.

By Mr. METTLER.—I want to object to this as asking for hearsay [66] testimony, testimony of Mr. Alderson, who can be called as a witness to prove the facts. It would be the rankest kind of hearsay evidence against these defendants.

By the COURT.—Yes, there might be some presumptions flow from it, however. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. I met Mr. Alderson and I told him we had not been able to get a jury list, and he said he thought he could help us.

Q. Go ahead; just tell us what he said.

A. He said he had one, but I don't think we got it through Mr. Alderson, I don't know.

(Testimony of Mrs. H. P. Umpsen.)

Q. What did he say about it, did he say he would give you one?

A. He said he would, yes, sir.

Q. Did he show you the list at that time?

A. No, no.

Q. Did you subsequently have a conversation with him with reference to the jury list?

A. Before this?

Q. No, subsequent to that time.

A. No, I had not.

Q. Didn't he afterwards ask you if you had got a copy of it, or received a copy of it?

By Mr. METTLER.—Objected to as leading and suggestive, incompetent, irrelevant and immaterial, not having to do with the case on trial here at the present time.

By the COURT.—Objection overruled.

By Mr. METTLER.—Note our exception.

A. No, I don't recall his asking me if I had it.

Q. Did he state to you at that time where he got his copy of the jury list? [67]

By Mr. METTLER.—The same objection to that question. We may have the same objection to this line of testimony, and the same ruling and the same exception.

By the COURT.—You may.

A. He did not, he didn't tell me where he got it.

Cross-examination.

(By Mr. EVANS.)

Q. Mrs. Umpsen, Mr. Henry C. Smith and Gov-

(Testimony of Mrs. H. P. Umpsen.)

ernor Hawley of Boise, Idaho, were your brother's and Mr. Wilmot's attorneys, were they not?

A. Yes, sir.

Q. I understood you to tell Mr. Wheeler that was the general advice of all the attorneys, as you recall it, that your brother and Mr. Wilmot should go on the stand? A. Yes, sir.

Q. The main advice that you relied upon was that of your own attorneys, Judge Smith, and Ex-Governor Hawley?

A. Governor Hawley was unable to give us advice.

Q. Didn't he finally, didn't he give you the benefit of his judgment finally upon it?

A. Governor Hawley was very ill. When we asked him whether my brother should go on the witness-stand, it would be hard for me to say exactly what he was trying to tell us, but my brother thought, my brother understood him to say, that he should go on the witness-stand.

Q. Your brother told you that?

A. No, I was present when Governor Hawley—

Q. I say, but your brother told you, that is what he understood Governor Hawley to say?

A. We went to the hospital to see Governor Hawley, to talk to him, at the hospital. We found him so ill that he could [68] hardly talk, in fact, it would be very difficult for him to talk, and we really didn't know what he wanted to say.

Q. You are very much interested in your brother's case, are you not, in the outcome, you naturally are very much interested?

(Testimony of Mrs. H. P. Umpsen.)

A. Naturally I am, yes, sir.

Q. You were here at the trial, you were here all through the trial? A. I was.

Witness excused. [69]

Testimony of D. G. Bertoglio, for the Government.

Whereupon D. G. BERTOGLIO, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name?

A. D. G. Bertoglio.

Q. What is your business?

A. General merchant.

Q. You are one of the defendants in the case, were you, that was on trial, the United States against Alderson and Bertoglio and Sidebotham and others, Alderson, Rae, Bertoglio, Sidebotham and others?

A. Yes, sir.

Q. Mr. Bertoglio, I will ask you if you talked with Mr. Kelly or Mr. Galen with reference to this case at any time? A. Why, in which way?

Q. Did you talk to them about the case at all, in any way?

A. Well, I don't know that, perhaps there was talk about it.

Q. Was anything said by either of them with reference to the jury? A. No, sir.

Q. Let me ask you, Mr. Bertoglio, if you did not know how this jury stood, or some of the jury stood

(Testimony of D. G. Bertoglio.)
prior to the time that the case was argued?

A. Absolutely not.

Q. I will ask you if you did not make a statement to the effect that some one had talked to two of the jurors at the Eddy Hotel? A. No, sir.

(By Mr. WHEELER.)

Q. Just a moment at the Eddy Hotel, and they [70] had said that they wouldn't vote for a conviction of any of the defendants.

By Mr. METTLER.—We object to that, at least, some of the details, we object to that as incompetent, irrelevant and immaterial, and also no foundation has been laid.

By the COURT.—Oh, yes, if it is for impeachment, it should be stated at what place, who were present, and the time. The objection will be sustained.

Q. Did you make a statement of that kind to Mr. Sidebotham, or to his wife?

By Mr. METTLER.—Same objection.

A. No, sir.

By the COURT.—The objection will be overruled, he has answered it though.

By Mr. METTLER.—Note our exception.

Q. Was anything said by you, Mr. Bertoglio, at any time during the trial of the case to Mr. Sidebotham, his wife, to Mr. Wilmot, or to Mrs. Umpsen, with reference to two of the jurors?

A. The only thing I can recollect—

By Mr. METTLER.—We will object; we interpose the same objection, irrelevant, immaterial and

(Testimony of D. G. Bertoglio.)

also no foundation has been laid.

By the COURT.—Objection overruled.

By Mr. METTLER.—Note our exception.

A. The only thing that I recollect is that one morning some one passed a remark that they heard some of the jurors,—two of the jurors discussing among themselves that the Government so far had failed to prove their case. That is the only thing I—

Q. Where was that statement made?

A. Why, I think it was against the railing over there (indicating).

Q. Against the railing?

A. Yes, sir. [71]

Q. Who was present at the time that that statement was made?

A. The only one I recollect was Mr. Speer and myself and myself and Mrs. Umpsen, and I think Mrs. Sidebotham.

Q. Was anybody else present at that time?

A. I don't remember.

Q. Let me ask you, Mr. Bertoglio, if Mr. Galen was not present at that time?

A. I don't remember if he was.

Q. Do you know whether Mr. Kelly was present?

A. I don't remember.

Q. Let me ask you, if it isn't a fact that the Eddy Hotel was mentioned on that occasion?

A. I don't remember.

By Judge PIGOTT.—I want to object. I made the objection just as quick as I could, and I ask that

(Testimony of D. G. Bertoglio.)

the answer be stricken out so that I can make my objection. He answered before I could make my objection.

By the COURT.—He has answered that he don't remember. Let the answer be stricken.

By Judge PIGOTT.—This witness is a witness for the prosecution. I undertake to say that in the United States Courts at least, which are governed by the common law with reference to the admissibility of evidence as it existed when Montana became a state in 1889, this witness being a witness for the prosecution cannot be impeached by showing contradictory statements, therefore the ground for impeachment cannot be laid. I don't think the common law would prohibit you from asking questions to refresh his memory, and call it to his attention. Whether he can be impeached subsequently, is a different question, different proposition, but now he may be asked if at such time and place he didn't say so, to refresh his recollection. [72]

By Judge PIGOTT.—Your Honor made the ruling that the time and place must be laid for the impeachment. I concede that to be the ground. You cannot lay the ground for impeachment of your own witness with respect to contradictory statements made by him.

By the COURT.—We will have to look into the law of the State at that time, or the law of the Territory. I am inclined to think that the law of the Territory was that you could show contradictory statements. We have a statute. You must remem-

(Testimony of D. G. Bertoglio.)

ber that this matter is being tried before the Court. Of course, you may take any steps that you deem necessary, but the Court is not going to be affected by anything that is not in accordance with the law in the final result.

By Judge PIGOTT.—I dislike, in this kind of a case, to make any objections at all.

By the COURT.—You do that to preserve your record, and see that the correct rules of law are applied. I would say that the Court's remarks that he is laying the foundation for an impeachment was inadvertent. Of course, you cannot impeach your own witness, strictly speaking. Proceed. Objection overruled.

By Judge PIGOTT.—Note our exception.

Q. What were you starting to say, you said, as near as —

By the COURT.—Let me see. The objection was overruled, and exception noted. The answer will stand.

Q. Let me ask you, Mr. Bertoglio, if you didn't make this statement,—if you didn't make the statement that everything was all right, and that Mrs. Umpsen and Mrs. Sidebotham didn't need to worry, or something to that effect? A. No, sir. [73]

Q. That was some—there was somebody that had talked to two of the jurors, and that they had stated they they would not vote for a conviction?

A. Absolutely not.

Q. And what you did say was what you have told

(Testimony of D. G. Bertoglio.)

us. Is that correct? A. Yes, sir.

Q. You also were anxious to take the witness-stand in the case, were you?

A. I had no objection.

Q. I say you were anxious to take the witness-stand? A. Yes, I was.

By Mr. METTLER.—We move to strike out the answer of the witness, and object to the question on the ground that it is incompetent, irrelevant and immaterial to any issue in this case, as to what he desired,—as to what his desires were, in this case.

By the COURT.—Motion denied.

By Mr. METTLER.—Note our exception.

Q. Let me ask you, Mr. Bertoglio, if the reason that you didn't take the witness-stand was not because of the fact that you were given to understand that some of the jurors had been fixed, or that they were favorable to the defendants? A. No, sir.

By Mr. METTLER.—Just a moment. The question is subject to the objection that it is double, it is in two alternatives, and it should be divided, and it is incompetent, irrelevant and immaterial, also hearsay.

By the COURT.—He asked for his reasons a little while ago.

By Mr. METTLER.—We object to it as leading and suggestive.

By the COURT.—Objection overruled, and motion denied. [74]

By Mr. METTLER.—Note our exception.

(Testimony of D. G. Bertoglio.)

Q. What was the reason that you didn't take the witness-stand in the case?

By Mr. METTLER.—Same objection.

By the COURT.—Objection overruled.

By Mr. METTLER.—Note our exception.

A. My attorney advised me not to take the stand, as the others were not going to take the stand. There was no use for me to take the stand, because he said there is no evidence against you.

Cross-examination.

(By Judge PIGOTT.)

Q. Just one question or two, Mr. Bertoglio. During the progress of this case against Alderson and Sidebotham and Wilmot and others, did you have any conversation with either Mr. Kelly or Mr. Galen about the case itself, during that time?

A. Not particularly about the case.

Q. Did you have any conversation about the case at all, during that time?

A. Well, I cannot recall the conversation we had about the case.

Q. Who was your attorney?

A. Mr. Lamb was my attorney.

Witness excused. [75]

Testimony of W. G. Brittenstein, for the Government.

Whereupon W. G. BRITTENSTEIN, a witness called and sworn on behalf of the Government, testified as follows:

(Testimony of W. G. Brittenstein.)

Direct Examination.

(By Mr. WHEELER.)

Q. What is your name?

A. W. G. Brittenstein.

Q. What is your business? A. Reporter.

Q. On what paper?

A. "Helena Independent."

Q. Mr. Brittenstein, where were you on the night that the case of the United States vs. Alderson and Rae went to the jury?

A. Oh, part of the time I was at some social function, I *don't* which—

Q. Well, you came up here to the court house that night, did you not? A. Yes, sir.

Q. Did you see any of the attorneys for the defendants in the neighborhood of the court house here, particularly Mr. Kelly and Mr. Alderson, or Mr. Rea?

A. Why, I passed them on my way up here.

Q. Whereabouts?

A. Why, about opposite the Germania Hall on Park Avenue here.

Q. Who were the ones that you passed?

A. As I recollect it, it was Mr. Kelly and Mr. Rae and Mr. Lamb.

Q. Mr. Kelly and Mr. Rae and Mr. Lamb?

A. Yes, sir.

Q. What time of the morning was that, or the night?

A. Oh, I am inclined to think it was about one forty-five A. M. [76]

(Testimony of W. G. Brittenstein.)

Q. Where is this Germania Hall?

A. Why, it is right down near the Helena Cab Company Building.

Q. On Main Street?

A. No, it is on Park Avenue there, I think that is the name of the street.

Q. Park Avenue?

A. The one that runs right past the Federal Building here.

Q. And you notified the marshal and told him that they were down there?

A. Well, I don't remember whether I did or not. I might have made some suggestion about their anxiety in the case at that time, I don't exactly recollect that, I don't know whether I told the marshal that or not.

By Mr. METTLER.—I move to strike out all the testimony of this witness as irrelevant and immaterial, and not illustrative of any issues in this case in the remotest degree.

By the COURT.—It looks very harmless. It will stand. If it is shown to have no materiality, it will have no consideration. The motion will be denied.

By Mr. METTLER.—Note our exception.

No cross-examination.

Witness excused. [77]

Testimony of Eli Knobb, for the Government.

Whereupon ELI KNOBB, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name to the Court and jury. A. Eli Knobb.

Q. What is your business?

A. Working as bailiff in the United States court.

Q. You are acquainted with Mr. D. M. Kelly?

A. Yes, sir.

Q. You are acquainted with Mr. Warner, one of the jurors that sat in the case? A. Yes, I am.

Q. And with Mr. Brown? A. I am.

Q. I will ask you where you were during the time that the jury was out considering the case of the United States against Alderson and Rae and others.

A. I was up there on the outside of the jury-room, and looking out of the window there.

Q. At what time?

A. About two o'clock or something like that.

Q. About two o'clock in the morning?

A. Yes, sir.

Q. And what, if anything, did you see out there?

A. I saw three men standing right over there (indicating) and one of them went to the back of the steps of the brick building there, and the other two went up to where the electric light was.

Q. What, if anything, was done by them? [78]

(Testimony of Eli Knobb.)

A. Then this one came out behind the steps, and these other two came down from the electric light, and they talked there, and waved their hands, or something like that, and they started down to the first street, Park Street, I think it is, and one went down that way, and the other two went down Sixth Avenue.

Q. What, if any, signs or motions were made by any of these parties with their hands?

A. They were talking there, and motioning with their hands, and then they left.

Q. Whereabouts were you standing?

A. I was standing right up at the window.

Q. The window at the back part of the building?

A. Back part of the hall.

Q. And at the time the party made some signs with his hands or arms, what have you to say, was he alone, or was he with the other two at that time?

A. They were all three together there at that time.

Q. All three together? A. Yes, sir.

Q. What was done, did they put their hands or arms over their heads, or what?

A. They had their hands up like this, and talking, I suppose they were talking. I couldn't tell what they were talking about.

Q. What direction were they looking at the time?

A. They were looking right over here at the court-room.

Q. Where was the jury-room, where was the jury confined with reference—

(Testimony of Eli Knobb.)

A. The jury was on that side, they had three or four windows, they had the blinds up.

Q. What, if anything, was done immediately afterwards, if anything, by the jury?

A. They wanted to go down to supper. [79]

Q. Who wanted to go down?

A. Why, Warner, and I think Brown, and I told them—

Q. What Warner, one of the jurors?

A. One of the jurors, and Brown was one of the jurors.

Q. Brown was the witness that was up on the stand here?

A. Yes, sir, and I told them they couldn't—

By Mr. METTLER.—I think we will object at this stage, to any statements made by this bailiff to the jurors, the parties not being present, the defendants, the parties charged not being present. The testimony is irrelevant, it would be hearsay and incompetent and immaterial. I make the same motion. I make a motion that all the testimony of this witness be stricken out on the ground that it is irrelevant and immaterial for any purpose.

By the COURT.—It may not appear so in the end. If it is, the court will attach no weight to it, or consider it. For the present the objection will be overruled.

By Mr. METTLER.—Note our exception.

By Mr. METTLER.—As to what was said by the jurors—

(Testimony of Eli Knobb.)

By the COURT.—The Court has ruled. Take your exception.

By Mr. METTLER.—Note an exception to both rulings of the Court.

Q. Do you know who those parties were that were standing over there across the street?

A. I don't know, it was kind of dark.

Q. How?

A. It was dark, I couldn't tell who they were. They were pretty stout men.

Q. And could you describe them. Can you give us any description of them?

A. Big man like Kelly there.

Q. How.

A. They were about the size like Kelly there.
[80]

Q. The three of them?

A. There were three of them, as I say, one was behind the steps, and the other two were there at the post, and then when the one came out behind the steps, they all three went down Park Avenue, and one went down Park Avenue, and the other two went down the street. I went to this window here to see, and in about fifteen or twenty minutes they came back again, about twenty minutes they came back again, about fifteen or twenty minutes they came back again.

Q. How long did they stay there when they came back the second time?

A. About thirty minutes.

Q. Whereabouts did they stay then?

(Testimony of Eli Knobb.)

A. The same place as the first time.

Q. What have you to say as to whether any signs were made at that time?

A. They were making motions, they had a paper, I think a newspaper, or something like that.

Q. Now, what if anything, was said or done after that time by any of them, anything said by any of the jurors?

A. Only they wanted to go down to supper, that is all.

Q. What time in the morning was it?

A. About two o'clock, or around there.

Q. What time did you take them down?

A. To breakfast?

Q. To breakfast?

A. They told me they wanted to go down there at six o'clock sharp. I told them that they couldn't go down at six o'clock sharp, because we couldn't get breakfast.

Q. Who was it that told you that?

A. I think it was Brown. [81]

Q. He said they wanted to go down at six o'clock sharp? A. Yes, sir.

Q. And at two o'clock, who was it that asked you to take them down?

A. I think it was Brown and Warner.

Q. What, if anything, was said by either of them with reference to paying for—

A. I told them the Government won't allow only three meals, and they said they would pay for it.

Q. Did you notice what became of the three per-

(Testimony of Eli Knobb.)

sons, was there three of them there the second time when they came back?

A. The second time one went down Park Street and the other two went down Sixth Avenue.

Q. Could you state whether or not it was the same three? A. The same three.

Cross-examination.

(By Judge PIGOTT.)

Q. Isn't it true that on that evening, as well as on other evenings, or the other evenings that the jury were in that room, that the blinds were pulled down?

A. No, sir, the blinds were up.

Q. Were the blinds down on this particular night?

A. I say they were up.

Q. How do you know?

A. Because they rapped for me to come in there, to open the door.

Q. You don't know who these three men were?

A. No, sir, I do not.

Q. They were making motions with their hands, you say?

A. Motions like that (illustrating), they had a paper and talking there. [82]

Q. You don't know who they were?

A. No, sir.

Q. You don't know whether they were Hebrews, or not? A. No, sir.

By the COURT.—They may have been French.

Q. How far away were you from these people?

A. From the courthouse over to that street, I don't know.

(Testimony of Eli Knobb.)

Q. About how many feet do you think that was?

A. It might be two hundred feet, maybe not that.

Q. Are there any lights, any street lights on this—

A. Yes, there are—

Q. Wait a minute. Are there any street lights on this parking here? A. No, sir.

Q. Could you see the features of them, of these men?

A. I could see them. It was quite dark, they were right there where the lamps were burning.

Q. They were talking together?

A. Yes, sir.

Q. You could hear their tone of voice.

A. No, sir, I could not.

Q. How do you know they were talking? Were they talking with their hands?

A. They were there together about five minutes after I seen them first.

Q. Didn't they turn their backs towards you at any time during the five minutes?

A. Yes, they wasn't standing still.

Q. No? A. They walked up.

Q. Did you time them, or just guessing? [83]

A. No, sir, I didn't time them, I didn't have no watch with me.

Q. They stood there gesticulating? A. Yes, sir.

Q. One of them had a newspaper?

A. In his hand.

Q. What kind of dress did they have on?

A. I couldn't say it was dark.

Q. What kind of suit did they have on?

(Testimony of Eli Knobb.)

A. I suppose brown suit on.

Q. Two hundred feet away, you saw that?

A. Might be two hundred or it might be one hundred and fifty.

Q. Might have been three hundred, might it not?

A. Might have been three hundred; yes, sir.

Q. Why did you pick out Mr. Kelly there as being the size of those men?

A. I didn't say it was him, I said a man about the size of him.

Q. Why did you pick him out?

A. I couldn't say; they was all pretty good-sized men.

Q. Why didn't you pick out this gentleman, the Judge, or the Clerk, or somebody else in the court room?

A. I thought they were about that size.

Q. Why did you pick him out, because he was on trial? A. I just picked him out.

Q. You would like to convict him?

A. No, sir, I would not.

Q. Did you talk about this matter with the District Attorney, or his deputies?

A. I spoke very little about it.

Q. Who suggested that you name Mr. Kelly?

A. Nobody but myself. [84]

Q. Why didn't you pick out the stenographer, he is nearer to you than Mr. Kelly?

A. I can't say; I didn't say it was him; I said about his size.

Q. No, you didn't say it was him, but you picked

(Testimony of Eli Knobb.)

him out of all the people that are in this room?

A. I don't know.

Q. How many people are there in this room, do you suppose?

A. I don't know, I didn't count them.

Q. Probably three hundred people in this room, are there not? A. Maybe, and maybe less.

Q. Aren't there plenty of people in this room, as closely corresponding to the size of those men, as does this defendant, Mr. Kelly, are there not twenty people in this room that correspond with him?

A. Well—

By the COURT.—Wait, let him finish his question.

Q. Mr. Knobb, aren't there fifty men in this room— A. I suppose there are.

Q. Just wait a moment. Aren't there fifty men in this room that in your opinion will correspond physically as well as Mr. Kelly does with those three men you saw on the night you speak of?

A. Oh, might be; yes, sir.

Witness excused.

Whereupon the court adjourned until two P. M.
[85]

Wednesday Afternoon, February 7th, 1917.

By Judge PIGOTT.—We would like to recall Mr. Bertoglio for a short further cross-examination.

By the COURT.—Call the witness.

**Testimony of D. G. Bertoglio, for the Government
(Recalled—Cross-examination).**

Whereupon D. G. BERTOGLIO was recalled for further cross-examination.

(By Judge PIGOTT.)

Q. Mr. Bertoglio, you were called by Mr. Wheeler to his office on yesterday? A. Yes, sir.

Q. Mr. Wheeler put the same question in substance to you then that he put to you this morning, did he not? A. About.

Q. Yes, and you gave the same answer to him on yesterday that you gave this morning in court?

A. As near as I can recollect.

Q. And is that the only time you ever talked to Mr. Wheeler about this case? A. Yes, sir.

Redirect Examination.

(By Mr. WHEELER.)

Q. Mr. Bertoglio, in your conversation with me yesterday, when I asked you about what was said or done, you first told me, didn't you, that you didn't know anything about any of the jurors at all, and that you had not said anything about any of the jurors?

A. You asked me if the jury was fixed, and I told you the only thing I knew or heard about the jury is what I testified to this morning.

Witness excused. [86]

By Mr. METTLER.—We will recall Mr. Byrn for further cross-examination on one point. I will say that Judge Pigott, who conducted the cross-examination, is not quite as familiar with the facts

(Testimony of D. G. Bertoglio.)

as I am. There is one point I would like to bring out on cross-examination, in connection with Mr. Galen.

By the COURT.—Proceed.

**Testimony of E. W. Byrn, for the Government
(Recalled—Cross-examination).**

Whereupon Mr. BYRN was recalled for further cross-examination.

(By Mr. METTLER.)

Q. You testified this morning regarding the Juror Warner having a conversation in the lobby of the Placer Hotel near the table on which the furs were being offered for sale, did you? A. Yes, sir.

Q. And what was the date of that?

A. Twenty-fifth of January.

Q. Now, I believe you said you were sitting in a chair, Warner was sitting in a chair there?

A. Yes, sir.

Q. At which end of the table with reference to Main Street, was that chair sitting?

A. Nearer Main Street than the other end.

Q. That would be the west end of the table?

A. If Main Street is the west, that is correct.

Q. I don't wonder you are turned around on directions in Helena. Now, had you observed Mr. Galen before this conversation occurred?

A. That evening, you mean?

Q. Yes, shortly before this? A. I had not.

Q. You had not seen him before?

A. No, sir. [87]

(Testimony of E. W. Byrn.)

Q. When you first saw him, where was he?

A. Why, he was about—several feet from Mr. Warner, approaching him.

Q. Now, from what direction?

A. Well, now, I don't know just how he got up close to Mr. Warner, the crowd was very dense at that time.

Q. It was very dense about this table?

A. Yes, sir.

Q. Who was with Mr. Galen, or did you notice anyone?

A. I didn't notice anyone with Mr. Galen. There were so many people around there, there might have been some one with Mr. Galen that I couldn't distinguish from the general crowd.

Q. Do you recall now that Mr. Galen came from the direction of the hotel desk?

A. I don't recall, but I think it is very probable.

Q. Are you acquainted with a man by the name of Diamond, who owned those furs?

A. I knew him by sight.

Q. Do you remember of seeing him with Mr. Galen there at the table?

A. I remember seeing Diamond around that table. I don't remember seeing him with Mr. Galen particularly.

Q. I will ask you if shortly before the incident that you testified about, there had not been an arrest made of the auctioneer by a constable. Do you remember that fact?

A. I remember there was some one came in there

(Testimony of E. W. Byrn.)

who I presumed to be an officer, and made some sort of a disturbance, I don't know—

Q. Stopped the sale?

A. I am not positive that that was on this same date or not. [88]

Q. You are not certain about that?

A. I remember that when that fur auction was taking place that some such occurrence actually happened. I wouldn't say positively that that was on this same date, the 25th; it might have been that day.

Q. Now, at the time that this arrest took place, or this disturbance, as you say, do you remember of Mr. Diamond and Mr. Galen coming up to the table together? A. I do not.

Q. You don't remember that?

A. I took no particular notice; that might have occurred.

Q. If Mr. Galen had been standing at the desk at this particular time, would it have been possible for him to have seen Warner sitting in the chair beside the table from his point at the hotel desk?

A. Well, it might have been possible, although perhaps improbable.

Q. Because of the crowd that was gathered about this table, standing up?

A. Some were standing and some were sitting, yes, sir, but in the position where Warner was, back of the table, I don't believe there were any number of people standing, there might have been one or two there.

Q. Do you remember seeing Mr. Galen at a point

(Testimony of E. W. Byrn.)

where he was in front of the table? Did you see him at any time in front of the table?

A. No, sir, I did not.

Q. The first time you saw him he was around to the side of the table? A. Back of the table.

Q. In order to get back of the table—

A. Back of the table, more properly speaking.

[89]

Q. But in order to get back of the table, he would have to come around the side, would he not?

A. Presumably.

Q. Around the west side, or east side, would it be the east side? A. Well, probably the east.

Q. You don't know which?

A. I don't know which side he approached from.

Q. Do you remember at the time that Warner spoke to him, that Mr. Galen's back was turned to him? A. Turned to who?

Q. To Warner at that time,—did you see him at that time?

A. I didn't see anything except Galen approaching Warner. Then he was perhaps two or three feet from Warner, but it appeared to me that Galen really walked up to Warner.

Q. You don't know whether there was anybody with Galen at that time? You didn't notice that there was anybody with him?

A. If there was, I didn't see them; there might have been, because there were a great many people standing around there; I couldn't distinguish an

(Testimony of E. W. Byrn.)

associate of his from one of the gentlemen in the crowd.

Q. Do you know whether Warner had beckoned Mr. Galen at that time which caused him to come to him?

A. I didn't see any such motion that indicated that.

Q. As a matter of fact, the first time you observed Mr. Galen was at the time when he was approaching Warner a distance of two or three feet?

A. It was.

Q. You had not seen him before that?

A. No, sir.

Q. And then you said that Warner handed him a paper at that time? [90]

A. Yes, sir.

Q. He handed it back to him?

A. He retained it in his hand for some short space of time, but subsequently handed it back to him.

Q. You didn't notice before that—you don't know anything further than that that occurred?

A. No.

Q. You were not close enough—how far were you from him? A. I was perhaps five to six feet.

Q. And in what direction? A. More westerly.

Q. Towards the west end? A. Yes, sir.

Q. And were you standing among the crowd?

A. I was seated.

Q. Oh, you were seated? A. Yes, sir.

Q. From your sitting position you would not be able to see Mr. Galen had he been over to the hotel

(Testimony of E. W. Byrn.)

desk, would you, do you remember?

A. The crowd possibly might have prevented my seeing that.

Q. At any rate, you didn't see him?

A. I didn't see him.

Witness excused. [91]

Testimony of W. B. Warner, for the Government.

Whereupon W. B. WARNER, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name.

A. W. B. Warner.

Q. And you reside where?

A. Deer Lodge, Montana.

Q. You were one of the jurors in the case of the United States vs. Alderson, Rae, Sidebotham and Wilmot? A. Yes, sir.

Q. When did you first become acquainted with Mr. Galen and Mr. Kelly?

A. I saw them right here the first time that I ever saw them.

Q. When did you first have a conversation with either of them?

A. Well, that I cannot say, sir, the very first time, but it was a while after I had been in court here, seeing them, I couldn't state exactly when.

Q. You had some bill that you were interested in which was pending in the Legislature, did you not?

(Testimony of W. B. Warner.)

A. Yes, sir.

Q. And you took that matter up with Senator Williams from Powell County, did you?

A. Well, I won't say that I took it up with him, because the bill was here.

Q. You spoke to him about it, I mean?

A. Yes, sir.

Q. And he suggested to you—who suggested to you that you speak to Mr. Kelly and Mr. Galen about this bill?

A. Why, Senator Williams.

Q. Just tell us what he said to you? [92]

A. Well, we were discussing the bill, he told me that he thought the Senate was all right, but I ought to work on the House, and so I was talking to everybody that I can, and one word brought on another, I cannot call exactly the thing as we talked of them, but he said that Mr. Galen and Mr. Kelly were ex-attorney generals, and they knew everybody, to see them, they would introduce me, that was what he meant by that.

Q. After that conversation you went to see Mr. Galen and Mr. Kelly, did you?

A. Well, sir, I couldn't say right then and there.

Q. I mean after that time? A. Yes, sir.

Q. And when and where did you have your first conversation with either of them?

A. The only conversation I ever had was right in the lobby of the Placer Hotel.

Q. How many talks did you have with Mr. Galen?

(Testimony of W. B. Warner.)

A. I had two, I cannot call to mind, I am not positive, I might have had two.

Q. And you talked with them with reference to what? A. Only the bill.

Q. About introducing you to people?

A. Yes, some members of the House.

Q. What have you to say as to whether or not he did introduce you to some of the members of the House?

A. Well, to the best of my recollection, he never introduced me to anybody.

Q. Did you say that he didn't introduce you to anybody at all?

A. No, sir, I won't say that he didn't, but my recollection is—I asked so many in regards to the bill, and met so many, that I actually cannot say that he did not. [93]

Q. You remember meeting Representative Searles?

A. No, sir, I don't believe I did.

Q. Would you say that Mr. Galen didn't introduce you to Mr. Searles?

A. No, sir, I don't think he did. I don't remember of meeting him. I believe I had a memorandum with his name on, I never met him.

Q. Do you recall while you were sitting here on the jury, about the first or second night, at about 5:30 in the evening, your coming down and speaking to Mr. Galen and asking him for the name of the party, the Representative of whom he had spoken to you, and do you remember his telling you that the name of the man was Representative Searles?

(Testimony of W. B. Warner.)

By the COURT.—Where was that?

By Mr. WHEELER.—In this courtroom.

A. I don't remember asking that at all.

Q. You don't remember asking that?

A. No, sir.

Q. Do you recall seeing him in the lobby of the hotel at that time and talking with him?

A. No, I don't recall it, but probabilities are that I did. I am almost sure that I did talk to him afterwards about that bill, and that is all the conversation I ever had with him.

Q. And you talked with him in reference to the bill, and in the lobby of the hotel?

By Judge PIGOTT.—With whom?

Q. With Mr. Galen? A. Yes, sir.

Q. And I will ask you if it is not a fact that you subsequently, after talking with him a few minutes in the lobby of the hotel, that you went in and had a drink with him? A. No, sir. [94]

Q. Where were you standing in the lobby of the hotel when you were talking with him?

A. Well, the only way I can explain that would be in front of that main door, around in there. I couldn't say, that is about the only place I ever met him.

Q. Do you know where the stairway is that goes from the lobby up to the dining-room?

A. I mean in front of that place like.

Q. Let me ask you if you were not standing with him at about the steps there, near the steps, on the

(Testimony of W. B. Warner.)

evening before the case went to the jury, if you didn't talk to him there for a few minutes, and then go into the saloon, or go into the saloon with him?

A. No, sir, I cannot recall to him every time, but I am sure that I never went into no saloon deliberately, and went in with Mr. Galen.

Q. I don't care whether you went in deliberately or not. Did you go into the saloon with him?

A. No, sir, that is what I mean, I never went from the lobby to the saloon with him.

Q. You never went from the lobby to the saloon?

A. No, sir.

Q. Do you remember the occasion of your talking with him at the stairway there?

A. Not exactly at the stairway, any place in there, right in the center of the floor among everybody.

Q. Do you remember having any drinks with him in the saloon at any time? A. No, sir.

Q. Would you say that you didn't have any drinks with him in the saloon? [95] A. Drink?

Q. Yes.

A. Not individually, sir; if I had any drinks it was with a crowd of men there; I don't know whether Mr. Galen drank with them, or with him, or anything like that.

Q. Would you say that you didn't have any drinks in a crowd? A. Yes, I had drinks with a crowd.

Q. Where Mr. Galen was?

A. Well, if he was in the crowd I had a drink with him.

(Testimony of W. B. Warner.)

Q. Do you know whether he was in the crowd or not?

A. I didn't associate with Mr. Galen, with him at all.

Q. You talked to him on numerous occasions about your bill? A. Not on numerous occasions.

Q. Well, on several occasions?

By Mr. METTLER.—We object. We have no objection to the cross-examination of this witness, but when it goes to the extent to say “numerous occasions” or “several occasions” when the witness has said not to exceed two, I think it is unfair to the witness, and unfair to the defendants who are under charge here.

By the COURT.—The Court will not be influenced by such questions. Objection overruled.

By Mr. METTLER.—Note our exception.

Q. I say, you talked to him several times, didn't you, about your bill?

A. Two or three times maybe, at the utmost.

Q. You remember the day that I was making my argument to the jury, you recall that time?

A. Yes, sir.

Q. You recall the fact that the Court had an intermission of about five or ten minutes during my argument, don't you?

A. Well, no; the intermissions were so often that I don't [96] remember them.

Q. Don't you recall of having a recess of about five or ten minutes during the closing argument to the jury? A. Was that on my own account?

(Testimony of W. B. Warner.)

Q. No, the Court gave a recess of about five or ten minutes, and you among the jurors went out in the room here to the corridor. Do you recall that?

A. No, sir; of course I recall the recess, but that time I don't.

Q. Do you recall Mr. Galen coming out there and talking to you at that recess or during that time, the last day of the trial of the case? A. No, sir.

Q. I will ask you if it is not a fact, Mr. Warner, that he came there where you were standing, put his arm on your shoulder, and started to talk with you during the recess? A. No, sir.

By Mr. METTLER.—We object to this question, as being in its nature an impeaching question, and it is improper for counsel to impeach his own witness. We object to the question as incompetent, irrelevant and immaterial.

By Mr. WHEELER.—The statutes provide how you may impeach your own witness.

By the COURT.—To refresh his recollection, I think it is proper. There are circumstances under which you may impeach your own witness. The objection will be overruled.

By Mr. METTLER.—Note our exception.

Q. Now, Mr. Warner, you remember having talked with me in the lobby of the hotel the day, or the night that the jury came in with their verdict?

A. I cannot remember that night, or anything, but I talked with you, sir, and you talked with me. [97]

Q. Mr. Adkinson, will you please stand up? You remember having seen Mr. Adkinson in the lobby of

(Testimony of W. B. Warner.)

the hotel with me on the night that the jury came in?

A. I couldn't say the night the jury came in; I saw him talking with you.

Q. It was after the case was over? A. Yes, sir.

Q. And do you recall the conversation that we had there that evening? A. Yes, I think I do.

Q. Do you recall my having asked you if you didn't talk to Mr. Galen in the lobby of the hotel, and that then, that you and Mr. Galen went in and had a drink together, or that in substance, and you having told me on that occasion that that was the fact?

By Mr. METTLER.—I object to this question for the reason that it embraces at least three separate propositions, one of which the witness had already testified was a fact, and the other he has not testified to be the fact, and the question should be divided in fairness to this witness, who is not an educated man.

By the COURT.—I don't see how you could divide such a question. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. Yes, you told me that was the fact.

Q. I asked you if it was not a fact that you went in there and had a drink with him, didn't I? You remember my having asked you that question?

By Mr. METTLER.—We object further to this line of testimony on the further ground that it was not had in the presence of Mr. Galen, who was the real party involved, he was not a party to it, and not in his presence, it would be hearsay and im-

(Testimony of W. B. Warner.)

proper for any purpose in this case. [98]

By the COURT.—Not for any purpose. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. I cannot answer that question that way, because you add more to it.

Q. Well, didn't I ask you,—do you remember whether or not I asked you if you didn't go into the bar-room with Mr. Galen and have a drink?

A. Yes, you did.

Q. And do you recall that you answered me that you did? A. No, sir.

Q. Would you say that you did not so answer me?

A. Yes, sir.

Q. And Mr. Adkinson was present at that time, that the question was asked you, was he not?

A. Not as I know of, not with me, and you, and he was not present.

Q. He was not present any of the time that you were talking with me?

A. No, sir; not that I can recall when the two of us were standing there talking.

Q. You would say that he was not present?

A. Not where I saw him, not where I was standing.

Q. Wasn't he facing you, you were standing on one side of me, and Mr. Adkinson was standing on the other side, facing each other?

A. No, sir; I walked right straight up in front of you and stood there.

Q. And Mr. Adkinson was standing right beside

(Testimony of W. B. Warner.)

me, came up there during the time that we were holding the conversation, isn't that the fact?

A. If I remember right, Mr. Adkinson was there; I am not positive, but he was not with me, he must have been to one side, because I [99] was right close to you.

Q. The next day, the following day after the conversation,—after I had that conversation with you, after I had that conversation with you, I will ask you if you didn't go to the office, come up to my office in the United States Attorney's office upstairs?

A. Some fellow came down to the hotel and said, you wanted to see me.

Q. And you came up there? A. Yes, sir.

Q. I will ask you if it is not a fact that on that occasion, when you came up to the office, if you didn't see Mr. Byrn, E. W. Byrn, there. Mr. Byrn, will you stand up? (Mr. Byrn complies.) I will ask you if you saw Mr. Byrn in the office on that occasion. A. The light is in my eyes.

Q. Step around this way, Mr. Byrn.

A. I think that is the fellow.

Q. You remember seeing him there?

A. Yes, sir.

Q. And I will ask you if you didn't state to me on that occasion, if I didn't ask you again on that occasion in the presence of Mr. Byrn, if it was not a fact that you talked with Mr. Galen in the lobby of the hotel and subsequently went in and had a drink with him, and if you didn't tell me on that

(Testimony of W. B. Warner.)

occasion that you did?

A. No, sir; I didn't tell you I did.

Q. How? A. No, sir; I didn't tell you I did.

Q. What did you tell me?

A. That is, I didn't tell you that I went in and had a drink with [100] Mr. Galen.

Q. What did you tell me?

A. I never told you anything.

Q. You didn't tell me anything?

A. If I recollect right, now.

Q. While you were down there in the lobby of the hotel, on the night before the case went to the jury, you had a conversation with Mr. Kelly, did you not?

A. When was that?

Q. The night before the case went to the jury, I say you had a conversation with Mr. Kelly in the lobby of the hotel?

A. Now, to make that thing emphatic I cannot say it was the night the case went to the jury.

Q. The night before the case went to the jury?

A. I cannot say anything like that. I had a conversation with Mr. Kelly, when exactly I couldn't say, sir.

Q. How many conversations did you have with him? A. I think two.

Q. The same night, or different nights?

A. Different nights.

Q. And both conversations were where?

A. In the lobby of the hotel.

Q. What was the nature of the conversation that you had with him?

(Testimony of W. B. Warner.)

A. The only thing that I remember, the conversation of any description I had with Mr. Kelly was, would he be kind enough to introduce me to some members of the house that I had a bill.

Q. Did he introduce you to anybody, or tell you that he would?

A. No, sir, he never told me that he would, if my memory serves me, I don't think he did.

Q. Do you know whether or not he did? [101]

A. That is as near as I can answer that, as far as my memory serves me right, I don't think he did.

Q. You went up to him on one evening, and went up to him at least two or three different times while he was standing at the cigar counter?

A. No, sir, I don't think I went up two or three different times in one night.

Q. Isn't it a fact that you first went up to Mr. Kelly and told him that you wanted to see him, and he said he was busy, and he would see you after a while. Isn't that what he said?

By Mr. METTLER.—I think this is objectionable. I object to it as improper. He should at least ask this witness to testify as to what did occur instead of attempting to put language into his mouth. Now, this is not an impeaching question. It is in the nature of cross-examination of the witness of the Government in this particular matter. It seems to me that it is objectionable, if after the witness has detailed what happened, as near as he can, the propriety of a question of that kind, the suggestion it-

(Testimony of W. B. Warner.)

self, that would be time enough, but until that time I don't think it should be done. I think it is prejudicial to the rights of these defendants who are on trial here for their liberty.

By the COURT.—I think he may answer.

By Mr. METTLER.—Note our exception.

A. Well, Mr. Kelly might have told me, but I couldn't say for sure.

Q. Well, what did he say to you, and what did you say to him?

A. That is all that I said to him.

Q. What did you say to him?

A. I went up to him and asked him to speak to him, and I knew that he was talking to somebody, but exactly what he said I couldn't say.

Q. Well, after the day that the case was over, or the day the jury [102] returned their verdict, you went in and had lunch with Mr. Galen and Mr. Kelly and Mr. Rae and Mr. Bertoglio and Mr. Lamb, and I don't know whether or not there was anybody else, is that correct?

A. It is correct, yes, sir.

Q. You got off the jury at what time?

A. I think about twelve o'clock, I don't know exactly.

Q. About what time?

A. I guess,—I say I guess about it; I think it was about 12 o'clock; I don't know.

Q. And you left here, and then met, and then went to lunch with them? A. No, sir.

(Testimony of W. B. Warner.)

Q. You went to lunch with them?

A. Yes, sir.

Q. Where did you meet them?

A. I just accidentally met them.

Q. Where did you accidentally meet them?

A. I was going into the dining-room; I had my hat and coat hung up, and somebody touched me on the shoulder and asked me where I was going. I said, "I am going into dinner," and I looked back, and it was Mr. Lamb. He said, "Eat dinner with us." I never answered Mr. Lamb, but I walked straight back and the waiter sat me down at the table, and that gentleman, I cannot recall his name—

Q. Bertoglio?

A. No; Lamb came right around and sat down beside me, then Mr. Lamb saw Mr. Kelly and Mr. Galen and—

By Mr. METTLER.—And Judge Smith?

A. The gentleman with gray hair.

Q. Judge Smith? [103]

A. Sitting over at another table, and he said, "Come over here."

Q. Who did he say that to?

A. I don't know.

Q. Who was sitting with Judge Smith?

A. Mr. Kelly and Mr. Galen.

Q. Let me ask you, Mr. Warner, if it isn't a fact that Judge Smith came into the dining-room before you came into it at all, and was sitting down at another table; that subsequently you, Mr. Lamb, Mr. Galen, Mr. Kelly and Mr. Rae and Mr. Bertoglio all

(Testimony of W. B. Warner.)

came in together, and went in and seated yourselves at the table together? A. No, sir.

Q. You would say that that was not a fact?

A. Yes, I went in and sat down by myself.

A. At a big table?

A. Yes, sir; the waiter sat me down, which he always does, and these other two gentlemen, Bertoglio and Lamb, come right in behind me, and sat at the same table.

Q. And did Kelly and Galen follow them, and Rae?

A. No, sir; they were over sitting down, over quite aways, and Mr. Lamb says, "Come over here and join us."

Q. Why, Mr. Warner, didn't you pass me, and wasn't I sitting at a small table, and didn't Mr. Galen pass me, and Mr. Kelly right behind him, and stopped at my table and talked to me?

A. No, sir; I never saw you until I saw you standing in front of me.

Q. You didn't see me until I came over and stood at the table and talked with you?

A. No, sir, I did not.

Q. You didn't see me when I stopped at the aisle?

A. No, sir.

Q. You didn't see Mr. Galen stop and talk to me?

A. No, sir, I did not. [104]

Q. Mr. Warner, when you came up to my office the first time that Mr. Byrn was there, I will ask you if I didn't ask you at that time if you had had

(Testimony of W. B. Warner.)

any conversation with Mr. Kelly, didn't you state in the office that you had never had a conversation with Mr. Kelly at any time at all? A. No, sir.

Q. And didn't I say to you at that time, Mr. Warner what is the use of your telling me that kind of a lie, because here is Mr. Byrn and Mr. Houston who both saw you talking to him, and didn't you say that, I never talked with Mr. Kelly but my conversation was entirely with Mr. Galen?

A. That was not the question that you asked me at all.

Q. That was not the question? A. No, sir.

Q. What was the question?

A. You said, "Didn't you go up to Mr. Kelly and ask him to—for a private interview," that is what you said, and I said, "No, I did not."

Q. Didn't you state—

By Mr. METTLER.—Wait a minute; just let him finish his answer.

A. No, now, Judge, can I use such language as was used to me in that courtroom?

By Mr. WHEELER.—I will bring it out.

By the COURT.—Proceed.

Q. All right; I cussed you, didn't I, and told you that you were lying to me?

A. That is not what you said to me.

Q. What did I say to you?

A. You said that I was a God damn liar.

Q. Yes, I told you you were lying to me when you came up to the office, and when you came into town yesterday I also sent for you again. [105]

(Testimony of W. B. Warner.)

A. You phoned for me.

Q. Phoned for you? A. Yes, sir.

Q. And you were at whose office: whose office were you at? A. I cannot recall his name.

Q. Mr. Galen's? A. No, sir.

Q. Mr. Mettler's?

A. Mettler; that is the name.

Q. Who sent you up to Mr. Mettler's office?

A. Nobody, I went myself.

Q. Well, who did you stop on the street and ask?

A. Mr. Galen.

Q. Mr. Galen? A. Yes, sir.

Q. Where did he tell you to go?

A. To go up to Mettler's office.

Q. He told you to go up to Mettler's office?

A. Yes, sir.

Q. And you then went up to Mettler's office?

A. Yes, sir.

Q. And you were subpoenaed here at the time as a witness for the Government? A. Yes, sir.

Q. And then you came up to the office here?

A. (No response.)

Q. I asked you then again yesterday, whether or not you had gone on in and had a drink with Galen, and isn't it a fact for the first time that you told me that you didn't have any drinks with Mr. Galen at all? [106] A. No, sir.

Q. How?

A. That is not the first time I told you that.

Q. That was not the first time? A. No, sir.

(Testimony of W. B. Warner.)

Q. Then you told me on yesterday at the office that you had had a conversation with Mr. Kelly?

A. I had another conversation?

Q. No, I say, you admitted to me on yesterday that you had a conversation with Mr. Kelly in the lobby of the hotel?

By Judge PIGOTT.—Is that a statement, or a question?

By Mr. WHEELER.—It is a question, sir.

A. I told you yesterday I had a conversation with Mr. Kelly?

Q. You did admit to me yesterday that you had a conversation with Mr. Kelly?

A. I admitted it the first time I was ever up to your office, sir.

Q. And I cussed you yesterday again, didn't I, and called you a liar? A. Yes, sir.

Q. And told you you were lying to me then?

A. Yes, sir.

Cross-examination.

(By Mr. METTLER.)

Q. You are a little hard of hearing?

A. Yes, sir.

Q. How old are you?

A. Forty-three,—forty-five I mean to say.

Q. Where do you reside?

A. Deer Lodge, Montana.

Q. How long have you resided there?

A. Four years and three months. [107]

Q. What is your business there?

(Testimony of W. B. Warner.)

A. I am a steel worker. I repair steel cars and things like that.

Q. How long have you been working at that business?

A. Four years and three months right there at the one place.

Q. Have you ever served upon a jury prior to this present term in the United States Court?

A. I was never in a courtroom before.

Q. Never in a courtroom? A. No, sir.

Q. You then have never been a witness?

A. No, sir.

Q. And you never had a lawsuit?

A. What is that?

Q. You never had a lawsuit?

A. I don't understand that question.

Q. You never had a lawsuit in court?

A. No, sir.

Q. Have you ever had any dealings with lawyers until this present time in any way?

A. I don't know whether you call dealings, to have papers drawn up, something like that.

Q. That is the only experience you have had, is to draw up papers for the purchase of a house and lot?

A. Yes, sir.

Q. I will ask you if you are the owner of any property in Deer Lodge?

A. Yes, every bit of it paid, nothing on it, or against it, or anything.

Q. You spoke of having,—are you a married man?

(Testimony of W. B. Warner.)

A. Yes, sir. [108]

Q. Have you a family?

A. Yes, sir, I have a wife; she is sickly.

Q. How is that? A. She is sickly, I say.

Q. You state that you own your own home there, I believe. You own your own home in Deer Lodge?

A. Yes, every bit of it.

Q. When was the first time you ever spoke to Mr. Wheeler, or he ever spoke to you regarding this particular matter that we are investigating now, as near as you can remember?

A. Well, I kind of think it was a Saturday, I am not positive; it was one afternoon, I think, right after the trial, or whatever it was, that he sent for me; I am not sure. I wouldn't say. It was one afternoon he sent for me.

Q. It was after the case had been decided?

A. Yes, sir.

Q. Now, can you recall when it was that you went up to his office?

A. What do you mean,—the day or date?

Q. Can you fix it in any way? I will say, do you remember the date that the sentence was imposed by the Court on the two men that were convicted?

A. I was going to say it was on the day.

Q. On that day? A. In the afternoon.

Q. In the afternoon of that day? A. Yes, sir.

Q. Now, you went into Mr. Wheeler's office, and he asked you certain questions there, I believe?

A. Yes, sir. [109]

(Testimony of W. B. Warner.)

Q. Now, do you remember of his asking you or telling you that Albert Galen bought a drink for you? A. No, sir.

Q. Did he ask you that question, did he tell you that?

A. No, sir; he never asked me that he bought a drink.

Q. What was it he said about Albert Galen?

A. He said I went into the Placer Bar with Galen to have a drink, something like that.

Q. What did you say in reply to that?

A. I said no I never did.

Q. What did Mr. Wheeler say when you told him that? A. He said I was a God damn liar.

Q. I want to ask you if you were ever accused of being a liar, in your lifetime before?

By Mr. WHEELER.—We object to that as being incompetent, irrelevant and immaterial, as to whether he was accused of being a liar or not.

By Mr. METTLER.—Some people get used to that.

By the COURT.—Proceed. Objection sustained.

By Mr. WHEELER.—He would be a peculiar man if he didn't.

By Mr. METTLER.—Note our exception.

Q. What was the next question, as near as you can remember, that Mr. Wheeler asked you?

A. The first day, the question as I—he said, “Don't you know it to be a fact that during the ten minutes recess that you went out in the hall, and Mr. Galen put his arm around you and said he would help

(Testimony of W. B. Warner.)

you with that bill?" I said, "No, sir, he did not. I have no recollection of his ever putting his arms around me at all." He said, "What are you sitting up there lying for?"

Q. Now, what next occurred? I want to ask you before you get to that, were you lying at that time?

A. No, sir, I was not. [110]

Q. Now, what was the next thing that was said?

A. Then, I think, Mr. Wheeler went out, I think he went out then, and then there was another fellow,—I don't know his name,—one fellow sitting right over there, if I remember right, one fellow standing at the table, and another one right here, and this fellow says to me, he said, "Now, if you want to tell all you know, we know more about this than what you think we do." He said, "You come across and tell what you know." I said, "I am telling all that I know." He said, "You are a liar, and you know it," and this other fellow on this side, I don't know at that time whether,—anyhow, he said, "You know me." I said, "No, sir, I don't know." So, he said, "Don't you remember me, seeing me?" I said, "I never remember seeing you at all." So then he, that was that fellow that was standing here, why, he went on to tell me that he saw me talking to Galen and Kelly and I acknowledged I talked to him. Then, of course, that took a little time, or quite a little time, and then Mr. Wheeler came back and he asked me the same question as the first time when I was in his office, asked me the same question. Of course, they all said I was a liar. I don't know

(Testimony of W. B. Warner.)

what all they didn't say in that respect, and that is the first time—

By Mr. METTLER.—May it please the Court. There is a certain matter that occurred in that office in which language was used stronger than has heretofore been used by this witness. I believe that it is material in this case. I notice that there are ladies in the courtroom. I would like to ask that they be requested for the time being to retire until I can bring that out.

By the COURT.—Well, it is the privilege of the ladies to retire. If they don't want to hear, they are privileged to retire any time. I don't know that the Court has a right to exclude anybody. [111]

By Mr. METTLER.—May I make the request of the ladies that they retire for a short time. It is a matter that I would very much prefer that would come up not in the presence of the ladies.

(Whereupon the ladies retired.)

Q. Mr. Warner, I wish you would now detail the statement which was made to you by Mr. Wheeler to the,—in which this improper language which you recited to me in my office on yesterday afternoon was stated.

By Mr. WHEELER.—That is objected to as being improper cross-examination. He has not stated that there was any other language used at all, and it is improper cross-examination.

By Mr. METTLER.—It is your witness.

By the COURT.—You may proceed. Objection overruled.

(Testimony of W. B. Warner.)

Q. And at the time,—go ahead and tell us what was said in regard to the,—I think it was something to the effect, if I am not mistaken,—

By Mr. MURPHY.—Let him answer that question.

By Mr. METTLER.—I will withdraw that question.

Q. I will ask you if Mr. Wheeler didn't say to you in his office on the occasion of your first visit there, which was the day that the two defendants were sentenced, that the other defendants in the case, or that Galen and Kelly were bull-shitting you, and that you were foolish to listen to them, and when they got through with you they wouldn't piss on you?

A. No, sir.

Q. State what was said in regard to that.

A. You say the first day?

Q. The day on which that statement,—any time, was that statement made at any time? Just state what was said.

A. He spoke to me about going in the bar with Mr. Galen, and I denied it. And he said, "You are a God damn liar." He said, "You let those fellows bull-shit you," but the other conversation I had [112] in the Placer Hotel with him.

Q. What was that? State that.

A. Why, that I went to Mr. Wheeler's, with the intention to ask for an introduction to somebody, that was my main object when I went up, I spoke to him, and he jumped me about the trial, and so, of course, I never expected such a rebuke, and surprise to me, so he said, "You are talking about your bill," he

(Testimony of W. B. Warner.)

said, he says, "to them fellows. Why, after this trial is over," he said, "you let bull-shit you, why," he said, "after this trial is over, why, they wouldn't piss on you." Now, I don't say that is the very words he said.

Q. That would be on the occasion of probably Saturday night, after the jury had brought in its verdict, wasn't it, the first time he spoke to you about it?

A. Well, them dates is what gets me.

Q. It was at the hotel, anyway?

A. It was in the Placer Hotel, right there in the middle of the floor. I know just the conversation.

Q. Now, then, the next occasion that you were in Mr. Wheeler's office was on yesterday when you went into his office in response to a telephone call. You may state what occurred there at that time.

A. Well, just the same thing over again. He wanted to impress on my mind that I went into this Placer Hotel with Galen to get a drink; that is, with Mr. Galen.

Q. Now, I will ask you to tell the Court what Mr. Wheeler said to you about Leavenworth?

A. Why, he said, that "you are a-lying, God damn you, and you know it. Now," he said, "If you don't come through, why," he said, "you are on the way to go to Leavenworth," or "I will send you to Leavenworth," or something like that. I was too frightened to— [113]

Q. You say you were frightened by this reference to Leavenworth?

By Mr. WHEELER.—Object to what the under-

(Testimony of W. B. Warner.)

standing with this witness is as incompetent, irrelevant and immaterial.

By the COURT.—Objection overruled.

By Mr. WHEELER.—Note our exception.

Q. What did you understand by Mr. Wheeler's reference to Leavenworth?

A. If I didn't remember as I told him,—I don't know; I have no recollection of Mr. Galen inviting me to get a drink, that he would send me to Leavenworth, that if I didn't he would send me to Leavenworth.

Q. What did you understand by Leavenworth,—that is the United States penitentiary?

A. Yes, sir.

Q. Did you change your testimony after that threat was made? A. Well, no, sir, I did not.

Q. I believe you stated,—now, at the time of your conversation in Mr. Wheeler's office on the night that the two defendants were sentenced—

By Mr. WHEELER.—Which one?

Q. That is the first one. What did Mr. Wheeler say to you, what question did he ask you about the ballots that were cast in the jury room?

A. He asked me what was the first ballot, and I told him it was acquittal. He said, "You know you are a God damned liar; it was not." He said, "You sit there and try to tell me it was acquittal."

Q. Was it a lie that you told him? A. No, sir.

Q. On the last day, which was yesterday, what conversation did you have with Mr. Wheeler regarding certain papers? [114]

(Testimony of W. B. Warner.)

A. Why, my coat was just open, or something, he happened to think about a note-book, he demanded it, and I gave him—no, he said, “Let me see your bill. Give me your bill.” I gave him my bill.

Q. You handed him this, did you?

A. No, I don’t think I did; he took it out of my hand. I just took out this thing, I handed it to him. He said, “Where did you get that envelope,—where did you get this?” I told him, “Cobb sent it to me.” He asked me if I knew a man by the name of Toomey,—Joe Toomey,—and I stopped to think, and before I could answer, he said, “Don’t sit there and tell me a God damned lie, like you have been doing”; so finally, that was, oh, it was quite a while after, he told me to go and think this over, about Galen, so this gentleman came out, and asked me how long did I know young Toomey; I told him, I just knowed him. I doubt whether he ever knows me or not.

Q. As a matter of fact, did you know or did you not know Joe Toomey? A. No, sir.

Q. No?

A. Wait a minute; if that little fellow over there is Joe Toomey, why, I know him.

Q. That is not Joe; that is Joe Toomey’s son.

A. That was the 4th of July, I saw him at the celebration.

Q. The last 4th of July at Deer Lodge?

A. Yes, I never spoke to the man; I know his face, and that is about all.

Q. Now, then, you went outside at Mr. Wheeler’s invitation, to go out and think this over?

(Testimony of W. B. Warner.)

A. Yes, sir.

Q. He had at that time told you if you didn't come through he [115] would send you to Leavenworth, or words to that effect? A. Yes, sir.

Q. And then sent you out to think it over?

A. Yes, sir.

Q. And did you think it over?

A. Why, no, because I had nothing to think over.

Q. Now, did you have afterwards?

A. I had nothing to think over that he had reference to.

Q. Did you come back into Mr. Wheeler's office?

A. Yes, sir.

Q. How did you happen to come back?

A. He told me to come back.

Q. What happened after you came back?

A. He asked me if I thought the thing over.

Q. What did you say?

A. I never answered him.

Q. Now, I will ask you in connection with these papers, whether he asked you for any more of those papers, or to look at them.

A. He said, "What else have you got in your pocket?" He said, "Give it here." I said, "I don't know that you have the authority to demand them things like that," I said; "If you have, why of course, it is different," but he got mad he kept asking for them, he had this book, and then—

Q. This book is your check-book, isn't it?

A. Yes, sir.

Q. He had that?

(Testimony of W. B. Warner.)

A. Yes he asked me for that first, right after he—

Q. He wanted that?

A. Right after he asked for my bill.

Q. The bill that you had in your pocket?

A. Yes, sir. [116]

Q. And then this check-book? A. Yes, sir.

Q. Now, what else occurred?

A. He said, "Give me the rest of the papers that you have in your pocket." I said, "I don't know that you have the right to demand those," I said, "I don't know." He said, "No, no, I ain't got any right." Well, I thought for a moment, "maybe he thinks there is something in there that I don't want to show him." I said, "There they are." He said, "No, I don't want the papers."

Q. Did you hand him the papers?

A. Yes, these are the ones, like this, I handed him, like that. I said, "There is memorandum for laws, those two pieces right here." He said he didn't want to look at them.

Q. Let *me the* bill that you say you took to Wheeler.

A. He read it. There is a whole lot of them. There is one by itself.

By Mr. METTLER.—I would like to have those marked for identification.

WITNESS.—Let me have them. Those are extra copies.

Q. Those are extra copies, are they?

A. You want them laws—

Q. Just the bill. A. Well, that is the bill.

(Testimony of W. B. Warner.)

Whereupon said paper was identified, marked identified for Defendants' 1.

Q. I will ask you, Mr. Warner, if this bill which has been marked identified for Defendant's 1, is the same bill, or a copy of the same bill that you have referred to in your testimony to-day here that you talked to Mr. Kelly about, and mentioned to Mr. Kelly and also mentioned to Mr. Galen? [117]

A. I don't understand your question exactly.

Q. You have referred to your bill that you were interested in. Is this the bill? A. Yes, sir.

By Mr. METTLER.—We offer this in evidence.

By Mr. WHEELER.—No objection.

Whereupon said paper was marked Defendants' Exhibit 1, and received in evidence.

Q. Now, as near as you can remember, without fixing the time, the exact date, state about when it was that you had your first conversation with Mr. Kelly.

A. Well, as I stated before, it was some time after the trial, I cannot tell exactly when it was; it was during that period.

Q. Now, your conversation with him concerned this bill entirely, nothing else?

A. I don't hardly think it concerned; I asked him to introduce me to some members of the House.

Q. For the purpose of this bill? A. Yes, sir.

Q. Now, did you speak to anybody else besides Mr. Kelly? A. Oh, gee, yes.

Q. You say you did? A. Yes, sir.

Q. Well, you would say that you talked to a great

(Testimony of W. B. Warner.)

many other people besides Mr. Kelly?

A. Yes, a good many of them introduced me, Mr. Healey—

Q. Mr. Healey, you say? A. Yes, sir.

Q. Now, Mr. Warner, is your memory good for names?

A. No, sir; I cannot remember names, hardly.
[118]

Q. Did you ever speak to Mr. Wheeler about it?

A. No, sir; well, he meets me, that is all, going up the steps.

Q. You saw him, and you were going to him, and he went up the steps? A. Yes, sir.

Q. Do you think he saw you coming?

A. I don't know whether he did or not.

Q. Do you remember what you said to those other people that you spoke about this bill to? Can you remember exactly your language?

A. No, sir; the conversation with all of them was that in my opinion it was a good bill; it would help the railroads eventually because the population would become greater by keeping the work here, there would be a demand for more commodity for life, and the railroads would finally,—it would cause them to have more traffic because more consuming of the goods, and things like that, and there would be more homes established through it, and it would help the farmers because their produce would be more demanded, and just along the lines like that. When I would get through telling them I would ask them to please consider it; if they could help it along

(Testimony of W. B. Warner.)

I would be thankful for it.

Q. These people that you would explain the benefits of the bill to, were those to whom you had been introduced as members of the House, were they not?

A. Yes, sir.

Q. And you were desirous of meeting as many members of the House as you could? A. Yes, sir.

Q. And as a matter of fact, did you meet a good many members of the House?

A. Yes, sir; I think pretty near all of them, pretty near. [119]

Q. Pretty near all of them? A. Yes, sir.

Q. When you spoke to Mr. Galen, you say that he told you that he was busy, and didn't have time to talk to you?

By Mr. WHEELER.—That is assuming—

By Mr. METTLER.—That is cross-examination.

By Mr. WHEELER.—You are assuming a state of facts that is not in evidence at all.

By Mr. METTLER.—I am cross-examining.

By Mr. WHEELER.—Ask him if it is so, don't ask him if he didn't testify to it.

By the COURT.—He didn't testify to that. The objection will be sustained.

By Mr. METTLER.—Note our exception.

Q. What did you tell Mr. Galen?

A. Why, I never told Mr. Galen anything. I just asked him—I went up and asked him if he would be kind enough to introduce me to somebody in the House.

Q. What is your recollection of his reply?

(Testimony of W. B. Warner.)

By Mr. METTLER.—I will withdraw that question.

Q. Wasn't his language to you, "I haven't got time to talk to you about it?"

A. Something similar to that. I am thinking; I cannot remember exactly everything because that was just my object on the bill, and I couldn't remember all these things that was passing through life that way.

Q. But as a matter of fact, so far as you recall, he didn't introduce you to anyone, any member of the House?

A. Yes, sir, neither one, Mr. Galen.

Q. You did, however, receive introductions to other people?

A. Oh, yes, lots of them. [120]

Q. Do you recall what Mr. Kelly's reply to you was when you spoke to him about this bill. You stated he was busy talking to someone else at the time. Now, what was his reply?

A. Well, as near as I can recollect, he put me off, I don't know exactly, whether he did or whether he didn't, but if I remember right, I know at the time, the first time I spoke to him, he didn't introduce me.

Q. Didn't Mr. Kelly tell you at that time that you had better talk to me about this bill after the trial is over, or words to that effect?

A. No, sir, I don't think he did that. I don't think he spoke,—I don't think,—when he was standing there talking to this gentleman, he put me off some way or other, but afterwards, the second time when I spoke to him he said something to that,—I never

(Testimony of W. B. Warner.)

bothered him any more. I *don't exactly* his exact words.

Q. Now, I want to ask you. Did you seek out and approach Mr. Galen yourself, or did he come and look you up? A. No, sir, I went to him.

Q. Did he ever go to look you up, and approach you first? A. No, sir.

Q. Did Mr. Kelly ever do that? A. No, sir.

Q. Mr. Warner, I want to ask you if you were influenced in your decision of that case that was tried, by anything that was said to you by Mr. Galen?

A. Absolutely not in any way, manner, shape or form.

Q. I will ask you if you were influenced in your decision in this case by anything that occurred between yourself and Mr. Kelly as has been testified here?

A. No, sir; I never knew him to do anything like that, couldn't have nothing to do with me that way. [121]

Q. I will ask you, Mr. Warner, if you remember Mr. Galen speaking to you upon one occasion during the trial of the case in the center of the lobby, or about the center of the lobby of the Placer Hotel, when you were standing close to Mr. Alderson, Do you remember his approaching you at that time?

A. Yes, sir.

Q. I will ask you if he didn't step up to you at that time, and state to you, "I would rather that you would not talk to Mr. Alderson, for he is a defendant on trial here." Do you remember he saying that?

A. Yes, sir.

(Testimony of W. B. Warner.)

Q. And if you didn't reply to him at that time, "What is the reason that I cannot speak? Is there anything—do I smell bad?"—is that the expression?

A. Yes, sir.

Q. State what you did say to him.

A. I said, "Do I smell bad, is the reason, or why, I cannot speak to him?" He said, "It don't look right." Then I realized my error, so I never spoke to him since then. I thanked him because,—

Q. Now, did you then say to him, "Well, can I speak to you then." Do you remember of your saying that to him?

A. I believe I asked him if I could talk to him, something like that.

Q. And what was his reply to that, if you remember? A. If I remember right, he said, yes.

Q. Then what occurred. You asked him with regard—

A. With regard to that bill, that was the first time I ever spoke to Mr. Galen, if my memory serves me right.

Q. And that is the first time he ever spoke to you?

A. Yes, sir. [122]

Redirect Examination.

(By Mr. WHEELER.)

Q. Mr. Warner, when I talked to you in the office on yesterday, isn't it a fact that I told you, and used the language to you, that if you came down here in this courtroom and lied, that I would send you to the penitentiary at Leavenworth? Isn't that the language exactly that I used?

(Testimony of W. B. Warner.)

A. No, sir; I don't think it was.

Q. Would you say that that was not the language that I used?

A. Well, you said something, about if I didn't come through.

Q. And tell the truth. Didn't I caution you several times to tell the truth?

A. Yes, you did caution me.

Q. And told you that I didn't want anything but the truth from you. Didn't I, on several occasions?

A. No, you said I was not telling the truth.

Q. And didn't I tell you that I didn't want you to tell me anything but the truth, on several occasions, and wasn't Mr. Baldwin, the gentleman sitting here, present in the office?

A. He was there one time that I know of.

Q. Wasn't he there all of the time, yesterday, sitting at the desk over,—

A. By golly, he was too.

Q. Now, Mr. Warner, let me ask you if it isn't a fact that I asked you how you expected me to believe you when you had told three different stories. Didn't I tell you that? A. No sir.

Q. Didn't I tell you up there yesterday that you had told me three different stories on each occasion that you had talked with me, and asked you, how you expected me to believe you under those statements, in view of those statements? A. No. [123]

Q. I didn't say that at all?

A. Not three stories, you said, coming up here and telling me these God damn lies.

(Testimony of W. B. Warner.)

Q. All three different occasions?

A. That is what you said, "coming up here and telling me these God damn lies."

Q. You remember that portion? A. Why,—

Q. You remember that distinctly?

A. Why, the insult, any man would remember that. I sat there and took it like a dog.

Q. You say you did? A. Yes, sir.

Q. Now, in order that I may be perfectly clear, and that you may be perfectly clear, I will ask you again, Mr. Warner, if it is not a fact that on the last day of the trial of this case, during the intermission, if Mr. Galen didn't come up to you and talk to you out here in the corridor, out here in the corridor of this building?

A. I have answered that question about six or seven times, maybe ten times in all.

Q. What is it?

A. I said, "No; Mr. Galen, to the best of my recollection, never did come up to talk to me." I told you to send for him.

Witness excused. [124]

Testimony of Joe Kirschwing, for the Government.

Whereupon JOE KIRSCHWING, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name to the Court.

A. Joe Kirschwing.

(Testimony of Joe Kirschwing.)

Q. Where do you reside? A. Great Falls.

Q. You are acquainted, Mr. Kirschwing, with the witness Warner that was just on the stand?

A. No, I am not acquainted with him; I know him.

Q. Have you ever seen him before?

A. I seen him on the jury.

Q. Did you have occasion when you were in the courtroom the day that the closing arguments were being made in this case, to notice him? A. I did.

Q. And about what time in the afternoon?

A. Why, really, I don't just remember the time, but it was when you were making the closing argument, then the Court took a recess.

Q. At that time did you see the juror Warner in the corridor?

A. I saw him; and I saw him in the corridor.

Q. Did you see Mr. Galen have any *occasion* with the juror Warner?

By Mr. EVANS.—We object to this, if your Honor please, as incompetent, irrelevant and immaterial. In that, we have no statute changing the common law, as far as we know, at the time of the admission of the Territory of Montana as a State in 1889, so that the common-law rule would apply, so under that I don't think it would be competent.
[125]

By the COURT.—It depends upon the attitude of the witness on the stand. I think he may answer. Even if it was not, even if it is a contradiction, it would be independent evidence, and certainly admissible as such. The objection will be overruled.

(Testimony of Joe Kirschwing.)

By Mr. EVANS.—Note our exception.

A. I saw him in the corridor.

Q. You saw him where?

A. I saw him out here in the corridor with Mr. Warner.

Q. Saw who out there? A. Mr. Galen.

Q. And what were they doing?

A. Why, they were having a conversation there, and Mr. Galen had his arm around Mr. Warner's shoulder.

Q. Where were they standing with reference to the window here in the corridor?

A. Right close to the window.

Q. And before they went out there, before he went out—before Mr. Galen went out in the corridor, did you see them have any conversation here, or anything said to them in the courtroom here?

A. Mr. Warner came from his seat in the jury-box and walked around this way, and met Mr. Galen right back of your chair, and whispered to Mr. Galen and Mr. Warner then walked out, and Mr. Galen followed him.

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Kirschwing, where were you?

A. I was sitting right there in the front row.

Q. Courtroom full? A. Yes, sir.

Q. And these seats were filled, were they? [126]

A. I think pretty well filled.

Q. Oh, probably one hundred to one hundred and fifty people in the courtroom anyway?

(Testimony of Joe Kirschwing.)

Q. Just about the same crowd as there is here now.

Q. The other jurors all came down too after they left their seats? A. Yes, sir.

Q. Had his Honor left the bench? A. Yes, sir.

Q. He had gone out? A. I think he had.

Q. Mr. Wheeler right here?

A. No, I think Mr. Wheeler had stepped out.

Q. Were any of the other gentlemen, Mr. Murphy or Mr. Baldwin, the assistant prosecutors here?

A. I don't remember whether they were or not.

Q. You don't remember? A. No, sir.

Q. Where was Galen when the juror Warner approached him?

A. Where do you mean? In the courtroom here, or out there?

Q. Yes, in the courtroom here, or out there.

A. How?

Q. Well, in here first. I understand Warner whispered to him first in here?

A. Mr. Warner came out of that seat over there, and spoke to him here (indicating), and met Mr. Galen right back of where Mr. Wheeler is sitting now, and he whispered to Mr. Galen; then Mr. Warner walked out of that door, and Mr. Galen followed out.

Q. Where were you sitting back there, what seat, do you recall?

A. When this happened, I was sitting right in front here (indicating); I don't remember which seat. [127]

Q. In front of the rail?

(Testimony of Joe Kirschwing.)

A. No, no, on the outside, and I stepped in this way (indicating) and walked out, and was naturally interested, and I saw Mr. Galen talking, as I have stated, to Mr. Warner, out here close to the window.

Q. Right in front of the door?

A. By the window.

Q. I say, in front of the door?

A. A little farther than the door,—well, just out here, a little from the door, on the other side of—

Q. In front of the door,—could you see him from the inside without stepping out there?

A. I stepped out there.

Q. Where was it with reference to the side of that door?

A. If I remember correctly, the window is almost opposite.

Q. Then anybody in here could see also out there, the door was open?

A. From over here (indicating).

Q. Yes. A. No, sir, they could not.

Q. Anybody in front of the door—

A. Anybody on that side (indicating) could see it.

Q. How long did they converse?

A. I didn't pay any attention to it.

Q. I thought you said you were naturally interested?

A. I was interested, from that standpoint, rather curious.

Q. You were?

A. As a citizen of the State I was interested enough, as a citizen of the State of Montana, as be-

(Testimony of Joe Kirschwing.)

ing a friend of the District Attorney for to notice those things.

A. And you didn't observe how long they talked?

[128] A. No, sir, I did not.

Q. How far were you from them when you stepped outside of the door?

A. Oh, I thought possibly ten feet.

Q. Did they see you?

A. I don't think they did.

Q. You don't think they did? A. No.

Q. Mr. Galen knows you very well, does he not?

A. I imagine he does.

Q. And knows you are very intimate with Mr. Wheeler? A. Possibly so.

Q. It is generally known, isn't it?

A. It is considered I am, Wheeler is a very good friend of mine.

Q. Are you connected with the Government in any way, Mr. Kirschwing? A. No, sir, I am not.

Q. How much of this trial did you attend?

A. Oh, I was up here on several occasions.

Q. You were here practically all through it?

A. I was in the city practically all through it.

Q. And you were here in the courtroom through a good part of it? A. Part of it; yes, sir.

Q. Did you have any direct connection with the trial, any interest in it, any special interest?

A. Any special interest?

Q. Yes.

A. Not at all. That is, none other, Mr. Evans, than being a friend of Mr. Wheeler, and being a

(Testimony of Joe Kirschwing.)

friend of Mr. Wheeler's, and knowing what Mr. Wheeler was up against in the trial of this case, and knowing the lobby that was working— [129]

By Mr. EVANS.—Just a moment—

By Mr. WHEELER.—You have asked him what his interest was; now let him tell it.

By Mr. EVANS.—Mr. Kirschwing's views are of no importance to anybody. It is not responsive to the question.

By the COURT.—I don't think that is material here. I think we will stop it here. I said the witness would stop at that point in the answer to that question.

Q. You reported this incident to Mr. Wheeler, Mr. Kirschwing? A. Beg your pardon.

Q. Did you report this incident to Mr. Wheeler?

A. Yes, I did.

Q. How soon after?

A. I don't remember just exactly. I think it was that same evening, possibly.

Q. Well, do you know. You say that same evening possibly. Was it, or was it later?

A. Well, I wouldn't be positive about that.

Q. Did you make a special point of going to Mr. Wheeler and report. That is what I want to know.

A. I didn't make a special point; I was not here for that purpose.

Q. Were you consulting with Mr. Wheeler during the trial of this case, about the case?

A. Why, we talked the case over.

Q. The evidence? A. No, sir.

(Testimony of Joe Kirschwing.)

Q. And since the trial, in connection with the contempt proceeding, have you consulted with Mr. Wheeler about it?

A. No, sir, that is, I have talked it over with him.

Q. The whole case? [130]

A. No, sir, not the whole case.

Q. Pardon? A. No, not the whole case.

Q. That part of it, what part of it?

A. Really, I couldn't tell you what particular part of it.

Q. Oh, who else were out in the outside, in the corridor, or hall there that day?

A. I don't remember.

Q. The other jurors saw it?

A. The other jurors were scattered around out there.

Q. A good number, at least, of the jurors went out through the door there, and were strung along the hall, and in plain sight of where you say Galen and Warner were?

A. They were scattered all throughout the corridor.

Q. I mean in this part of it, this west part of it?

A. Not particularly, they were scattered all over the corridor.

Q. There were some of them in this west part in plain sight of Galen and Warner, were they not?

A. Yes, sir.

Witness excused. [131]

Testimony of R. H. Adkinson, for the Government.

Whereupon R. H. ADKINSON, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name.

A. R. H. Adkinson.

Q. What is your business? A. Salesman.

Q. Do you know Mr. W. B. Warner?

A. I do.

Q. Did you see him in the lobby of the Placer Hotel? A. I have.

Q. Were you present at a conversation that took place between Mr. Warner and myself?

A. I was present part of it.

Q. I will ask you if you recall my having asked Mr. Warner with reference to whether or not he talked with Mr. Galen in the lobby of the hotel and then went into the bar-room of the Placer Bar and had a drink with him?

By Mr. METTLER.—We object on the ground that it is an attempt to impeach his own witness.

By the COURT.—I will allow it, and we will settle the law later. If it should not be admissible, of course, the Court will give no weight to it. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. I do.

Q. You may state what was said by Mr. Warner

(Testimony of R. H. Adkinson.)

with reference to whether or not he did talk to Mr. Galen, and then go into the bar-room and have a drink?

A. At first he said he did not, and then afterwards he admitted that he did. [132]

Q. What did he say about it? Did he say why he went in there, if you recall?

A. No, he did not when I was there at least.

Q. How much of the conversation did you hear that took place there? A. Very little of it.

Q. You came up while we were talking?

A. Yes, sir.

Cross-examination.

(By Judge PIGOTT.)

Q. You were the bookkeeper, Mr. Adkinson, were you not, of the Northwestern Trustee Company?

A. Part of the time; yes.

Q. When these troubles came up, they discharged you, didn't they?

A. No, I wouldn't say that.

Q. Were you not discharged by the Board of Directors when this trouble occurred?

A. No, sir.

Q. Or shortly afterwards? A. No, sir.

Q. Are you still there as an officer? A. No, sir.

Q. How did you get out? A. Resigned.

Q. At whose request?

A. At my own request. I resigned several different times, as a matter of fact.

Q. What are you doing now?

A. I am on the road selling goods. [133]

(Testimony of R. H. Adkinson.)

Q. For whom?

A. For several different companies.

Q. How did you happen to be in the Placer Hotel on the night that you mentioned?

A. Well, I had been here in town for some time past, and go in there nearly every evening.

Q. What have you been doing here in Helena for the last three or four weeks?

A. Part of the time attending on the trial and part of the time selling goods.

Q. What were you doing here?

A. I was subpoenaed here by the Government.

Q. For whom? A. For the Government.

Q. Against the clients represented by Mr. Galen and Mr. Kelly?

A. I suppose you would figure it that way.

Q. And you remained here during the whole trial, Mr. Adkinson? A. Yes, sir.

Q. Do you know Mr. Wheeler? A. Yes, sir.

Q. You have been quite friendly with Mr. Wheeler ever since this case began, have you not?

A. Not so very friendly. I knew him since the Grand Jury was in session.

Q. You were a witness before the Grand Jury?

A. Yes, sir.

Q. You have not very kindly feelings towards the defendants who were convicted, as well as those who were acquitted during this last trial?

A. My feelings are rather friendly.

Q. You say they were rather friendly?

A. Yes, sir. [134]

(Testimony of R. H. Adkinson.)

Q. And are yet? A. Yes, sir.

Q. And also you a friend of Mr. Wheeler's?

A. Yes, sir.

Q. Did you consult with Mr. Wheeler during the trial as to the evidence, or what you were going to testify about?

A. I consulted with him a little before hand, yes, sir.

Q. When did you first meet Mr. Wheeler, how long ago?

A. During the session of the Grand Jury, last June.

Q. Last June? A. Yes, sir.

Q. Your sympathies were with the defendants; or with the prosecution, or with Mr. Wheeler in this prosecution? A. I wouldn't say with either.

Q. Did you consult with the attorneys for the defense?

A. I talked to several of them different times, yes, sir.

Q. During the trial? A. Yes, sir.

Q. About what evidence you were going to give?

A. No, sir; they didn't ask me that.

Q. And you didn't volunteer it?

A. Not about the evidence, no; I wasn't handling their case for them.

Q. No; did you volunteer to Mr. Wheeler what your evidence was going to be? A. No, sir.

Q. Did you ever talk to him about your evidence?

A. He asked me what I knew about it, different times, about certain phases of it.

(Testimony of R. H. Adkinson.)

Q. Isn't it a fact that you spent considerable part of your time here with Mr. Wheeler? [135]

A. Well, I have been here in court during the trial.

Q. With Mr. Wheeler, I said.

A. No, not with him, only once in awhile, while I was in the office upstairs.

Q. Didn't you spend a great deal of your time, or a considerable part of it, in the District Attorney's office in this building?

A. Not very much; I was there four or five different times, probably.

Q. Sometimes you went there of your own volition, without being asked to go by Mr. Wheeler, did you not?

A. No, sir; I cannot say that I did.

Q. Now, you say that you heard Mr. Warner say that he first denied taking a drink with Mr. Galen?

A. Yes, sir.

Q. And then afterwards admitted it?

A. Yes, sir.

Q. Did you notice that he was quite deaf, Mr. Warner?

A. Yes, I know he is a little deaf; yes, sir.

Q. What did Mr. Wheeler ask Mr. Warner with respect to having talked to Mr. Galen? What was the question that Mr. Wheeler put in your presence to Mr. Warner as to Warner's talk with Galen?

A. He asked him if it was not a fact that he had a talk with Mr. Galen, and afterwards took a drink with him.

(Testimony of R. H. Adkinson.)

Q. Did he fix the time?

A. During the time that the case was on.

Q. What did Warner say?

A. He said no.

Q. Where did that happen?

A. In the Placer Hotel. [136]

Q. Was that in the Placer Hotel?

A. Placer Hotel.

Q. How far away were you from Warner at the time Wheeler asked him that question?

A. Right close to him.

Q. Did Mr. Wheeler ask you to stand there and listen to it? A. No.

Q. How did you happen to be there with Mr. Wheeler on that occasion?

A. I just happened to meet him there.

Q. And when you—who went first into the hotel, you or Wheeler, or Warner?

A. I couldn't say.

Q. About what time in the evening was it?

A. Along about eight o'clock, a little after eight.

Q. Who broached the subject to Warner, you or Wheeler?

A. They were talking when I went in there, when I went up to them.

Q. You didn't know what they were talking about before that? A. No, sir.

Q. You went up to him? A. I passed them.

Q. Were you walking rapidly, or slowly?

A. Not very rapidly in the hotel.

Q. What did you stop for?

(Testimony of R. H. Adkinson.)

A. Because I knew them.

Q. How long have you known Warner?

A. Since the trial commenced.

Q. Had you met him, been introduced to him?

A. I had not been introduced to him, but I spoke to him several [137] times.

Q. Did you talk to him while the trial was going on?

A. Very little, in passing him; I would pass the time of the day was all.

Q. What made you stop when you saw Wheeler and Warner talking?

A. I don't know; because I knew them, I suppose.

Q. You didn't know Warner,—you just spoke to him because you had seen him here?

A. I had never been introduced to him, no.

Q. Did you stop to overhear the conversation?

A. Well, I stopped; I couldn't say it was to overhear the conversation.

Q. They were talking when you came up?

A. Yes, sir.

Q. And they were not talking to anybody else except themselves, were they,—one was talking to the other?

A. When I came up there Mr. Warner or Mr. Wheeler turned around and spoke.

Q. And you stopped?

A. And I stopped; yes, sir.

Q. And they continued their conversation, did they? A. Yes, sir.

Q. What did Mr. Wheeler say to Mr. Warner or

(Testimony of R. H. Adkinson.)

Mr. Warner say to Mr. Wheeler, the first thing either one said?

A. Well, the first that was said was, Mr. Wheeler said, "Mr. Warner, I understand that you had a talk with Mr. Galen, and afterwards went and took a drink with him in the bar." He, Warner, said, no, he did not, and Mr. Wheeler mentioned it to him again, and he admitted that he did.

Q. Did what?

A. Talked with him, and took a drink with him.

Q. Both? [138] A. Yes, sir.

Q. Admitted both? A. Yes, sir.

Q. Wheeler first said to him, "I understand you had a talk with Galen and a drink with him at the Placer bar"? A. Yes, sir, at the bar here.

Q. That is the first thing that Wheeler said to him that he talked?

A. Yes, sir; the first thing that I heard.

Q. That Warner had done these two things, had talked with Galen and had a drink with him at this bar? A. Yes, sir.

Q. Then Warner said, "No," answering both those questions? A. Yes, sir.

Q. Then what did Wheeler say to him?

A. Well, he said practically the same thing to him again.

Q. Did he call him a liar then? A. No, sir.

Q. Then didn't Wheeler say to Warner, "But you talked to him," leaving out the question of drinking, didn't Wheeler say to Warner, "You talked to him," to Galen?

(Testimony of R. H. Adkinson.)

A. No, he didn't separate them that way.

Q. He did not? A. No, sir.

Q. Isn't it true that Wheeler at once said, "But you talked to Galen," and Warner said, "Yes, I talked to him." And then Wheeler said, "You came in here and drank with him," and Warner denied it, and said he did not. Isn't that true?

A. No, sir; not when I was there.

Q. Isn't it possible, conceding the truth of your statement, that Warner's deafness prevented him from understanding [139] the full question that Wheeler put to him? A. I hardly think so.

Q. What did Mr. Wheeler say when Warner said, "Yes," that he had both talked with him, and taken a drink with him? A. He said he knew it.

Q. And then what happened?

A. I left shortly after that. They were still talking when I left.

Q. They were still talking? A. Yes, sir.

Q. You don't know what they talked about, of course, after that, because you were not there?

A. Not after that.

Q. You don't know whether or not Warner qualified the statement that you say he made admitting that he had talked with Galen, and taken a drink with him? A. No, sir.

Q. Did Warner give any explanation of that sudden change of front, first denying that he had not talked to Galen, and didn't take a drink with him, and in almost the next breath telling Wheeler that he had done both? A. No, sir.

(Testimony of R. H. Adkinson.)

Q. He seemed to be perfectly satisfied with his two contradictory statements, did he?

A. Yes, sir.

Q. And you didn't attribute that perfect satisfaction to the misunderstanding that Warner might have had of the question put to him by Mr. Wheeler?

A. I don't understand the question.

Q. You didn't attribute that perfect satisfaction to the misunderstanding that Warner might have had of the question put [140] to him by Mr. Wheeler? A. No, sir.

Q. What did you say during this conversation, to him? A. That was about all I said; I left.

Q. But you stood there listening to the conversation? A. A very short time; yes, sir.

Q. Of course, you had no astonishment, amazement, or surprise at the other two contradictory statements made by Warner, did you?

A. No, sir.

Q. Seemed perfectly homogenous, those two statements to you? A. Not to me, they didn't.

Q. Have you talked to Mr. Wheeler about those two alleged contradictory statements made by Warner? A. Yes, sir.

Q. How soon after the conversation that you have related took place at the Placer Hotel in which Warner made those two contradictory statements, almost in the same breath, when did you have this conversation with Mr. Wheeler?

A. That was to-day.

Q. Did he call for you, or did you—

(Testimony of R. H. Adkinson.)

A. He called for me.

Q. Or did you send word to him?

A. He called me.

Q. Is that the first time you ever mentioned this conversation in the Placer Hotel to Mr. Wheeler?

A. Yes, sir.

Q. Then, if I understand you, Mr. Wheeler said to Warner in the Placer Hotel—I understand this is the substance of it. “I understand that you have been talking to Albert Galen and that you took a drink with him in here.” Warner said, “I did not.” Wheeler said, “I know you did.” And Warner said, “Yes, I did.” [141] Is that the substance of it?

A. That is the substance of it; yes, sir.

Q. Did Mr. Wheeler seem surprised?

A. No, sir; I couldn't say that he did.

Q. Any more than you were? A. No, sir.

Q. Then Mr. Wheeler said, “I know you did,” speaking to Warner?

A. “I know you did,” or “I knew you did”; I wouldn't say which it was,—one of the two.

Q. You wouldn't say which it was, one of the two. There wasn't any explanation made by Warner at that time, except the remark made by Wheeler, to the effect that he knew that he had?

A. No, not when I was there, there was not.

Q. And you left immediately after this conversation? A. I left about that time.

Q. About that time, was there any other conversation between Wheeler and Warner while you were

(Testimony of R. H. Adkinson.)

there, except that that you have related?

A. I think that is all.

Q. You didn't talk to Mr. Wheeler that night about this conversation?

A. I don't think I saw Mr. Wheeler that night again.

Q. You don't think you saw him? A. No.

Q. Did you see him the next day?

A. I couldn't say that I did.

Q. Did you make a memorandum of that conversation in that book you keep? A. No, sir.

Q. And you never talked to Mr. Wheeler, nor did he ever talk with you about that conversation until yesterday? [142] A. Until to-day, I think.

Q. But you remember the conversation? How did it happen to impress you?

A. Well, it impressed me as being rather funny that the juror and attorney were around drinking together, and talking, when the case was on trial.

Q. Did Mr. Wheeler say anything in the Placer Hotel in that conversation, anything about Warner having talked about the case, or was the remark general that he had been talking with Galen?

A. The remark was general.

Q. And you left Wheeler and Warner seemingly in a friendly attitude towards each other when you left? A. Well, seemingly; I don't know.

Q. Well, seemingly, as far as you could judge?

A. Yes, sir.

Q. When did this happen, this conversation in the Placer Hotel?

(Testimony of R. H. Adkinson.)

A. That was the day the verdict was returned, if I remember correctly.

Q. Before or after the verdict?

A. After the verdict.

Q. On the same day? A. Yes, sir.

Q. How long after the verdict?

A. It was in the evening; I don't know what time the verdict was returned,—some time in the day, I understand. This was the evening the verdict was returned, if I remember correctly.

Witness excused. [143]

**Testimony of E. W. Byrn, for the Government
(Recalled).**

Whereupon Mr. E. W. BYRN was recalled for further direct examination.

(By Mr. WHEELER.)

Q. Mr. Byrn, do you recall Mr. Warner being up at my office? A. I do.

Q. Do you recall his conversation with me, with reference to whether or not he had a drink with Mr. Galen?

By Mr. METTLER.—Let us have a general objection to all this kind of testimony, and the same ruling.

By the COURT.—It will be so understood; the record will so show.

A. He denied having any drink with Galen.

Q. You mean the first time that he was up there?

A. Yes, sir.

Q. And what was his conversation that he had

(Testimony of E. W. Byrn.)

with reference to having a talk with Kelly?

A. He denied that he had ever had a talk with Kelly.

Q. And was that asked him several times?

A. The question was repeated a number of times by yourself, by Mr. Watt, Mr. Houston and also by myself, and Warner evidently became a little shaken in his story—

By Judge PIGOTT.—I move to strike that answer out.

By the COURT.—Oh, no. How could it be explained, how could he explain it otherwise? You might be able to draw conclusions from a conversation sometimes; sometimes occasions present themselves that cannot be set out in the testimony in any other way. If it is not material or competent, the Court will not consider it.

By Judge PIGOTT.—Note our exception.

A. He evidently became a little shaken in his statement, and qualified it by saying that if he had talked with Mr. Kelly, or had this drink with Mr. Galen, he didn't remember. [144]

Q. And do you remember the fact was brought out, I asked him with reference to his conversation,—I would say, do you recall my asking him with reference to his having a drink with Galen, and what he had told me on the night previous?

A. He said he didn't recall ever having told you that he didn't have a drink with Galen.

Q. Do you recall what questions were asked of

(Testimony of E. W. Byrn.)

him, by you and Mr. Watt and Mr. Houston, with reference to his having talked with Mr. Kelly?

A. Why, the questions generally were to the effect that he had talked with Mr. Kelly, and he at first denied it. Then Mr. Watt and Mr. Houston and myself told Warner that he had seen him have such a conversation with Kelly. Then, if we made such a statement to him, would he say that that was false. He said that he didn't think he had talked with Mr. Kelly, and it was at that time that he weakened in his statements to the effect that he ever talked with Kelly, that he didn't think he ever had a talk with Kelly.

Q. He also stated at that time that if he had had a drink with Mr. Galen, that he didn't recall it?

A. Yes, sir.

Q. Now, was anything said by me to him during the time that you were there on that occasion, that unless he came through, that I would send him to Leavenworth? A. I heard nothing of that sort.

Q. I will ask you whether or not I cautioned him about the truth, and told him—

A. He was repeatedly cautioned by you, and I know by myself, that we wanted merely the truth.

Q. Do you recall my having told him about having made different statements, and about his lying to me?

A. Yes, I recall that you told him that he had told you two [145] or three stories already. How could he expect you to believe any one of them, or anything further that he might say.

(Testimony of E. W. Byrn.)

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Byrn, Mr. Watt that you spoke of is also a Special Agent of the Government? A. He is.

Q. Engaged in this investigation work and in getting evidence,—you object to the word “detective”?

A. Yes, he is engaged in that line of work.

Q. And has had quite a wide experience in that?

A. Yes, sir, I understand he has.

Q. Mr. Houston has also had some experience in that same line, or is he strictly an accountant?

A. He is strictly an accountant, so far as I know.

Q. He is a special agent?

A. I think he is a special accountant in the Department of Justice; he is an expert in the Accounting Department of Justice.

Q. When Mr. Warner came in there, there was Mr. Watt as Special Agent, yourself as Special Agent, Mr. Houston as Special Agent, Mr. Wheeler, and anybody else there?

A. I was not in the room when the conversation first started.

Q. While you were there, there were four of you there? A. Yes, sir.

Q. Anybody else? A. No, sir.

Q. Four besides Warner?

A. Yes, sir, and they were not all in that room all of the time; I didn't stay there all of the time.

Q. What were you doing,—giving him what you call the [146] third degree? A. No, sir.

Q. Now, isn't that what you were doing?

(Testimony of E. W. Byrn.)

A. It was not, I stated.

Q. Have you given your language that you used to him? A. How is that?

Q. On the stand here, you said you told him that you only wanted him to tell the truth, and cautioned him. Was that the language you used?

A. It was. I at no time indulged in strong language in that room.

Q. Did anybody? A. Yes, sir.

Q. Who?

A. As heretofore testified, Mr. Wheeler told him that he was a God dam liar.

Q. In a very savage way?

A. It was not a very pleasant way.

Q. Anybody else tell him that?

A. I don't know; he might have been called a liar more than once in that room on that occasion.

Q. And Houston called him a God dam liar too, did he not? A. No, I don't think he did.

Q. Did he call him a liar?

A. He possibly called him a liar.

Q. You made it clear to him, of course, that all you wanted was the truth?

A. I endeavored to.

Q. Mr. Wheeler did too?

A. I think so; that was the spirit of the meeting.

Q. At the same time you told the man he was a liar, and told [147] him what he was telling was not the truth.

A. I have heretofore testified that I didn't use

(Testimony of E. W. Byrn.)

any profanity. Profanity was used in that room; yes, sir.

Q. Now, you know what is called the third degree in criminal work?

A. I have heard a great deal of it, but I never, of what they call the third degree, but I never had any experience with it. Yet, the average layman seems to know more about it than the people that are experienced in that line.

By Mr. MURPHY.—We object to that.

By the COURT.—The Court might like to know about it.

Q. Mr. Byrn, what was there lacking in this, what is commonly known as the third degree work?

A. I have explained to you that I have never seen any of the so-called third degree work.

Q. You don't know what I mean?

A. Well, there is a good deal of popular sentiment, more or less, purported sentiment, that is the third degree. Do you really know, I don't.

Q. What do you understand by that?

A. It is a vague idea that some people seem to have in their brain that some physical force or mental force, under pressure of some sort or other, which is used upon a man in a brow-beating way, to force from him statements in regard to the truth.

Q. Getting some poor devil in a room along with three or four police officers, perhaps, and perhaps a prosecuting attorney, and trying to brow-beat him, and make him say something that perhaps is not the truth, that he does not know to be true. Is that the

(Testimony of E. W. Byrn.)

third degree, as you understand it?

By Mr. WHEELER.—We object to this as argumentative. [148]

By the COURT.—He may answer the question.

A. Securing statements from a man which he would not otherwise give, by various means.

Q. By abusing him, perhaps striking him, by intimidating him any way?

A. What third degree methods are, I am not able to state to you, because there may be other different methods applied perhaps; I don't know what they are.

Q. In your experience in police work, you have never seen any of them?

A. I have never. I have been in some of the biggest police departments of the United States, and I never saw any of it,—in fact, I have been in most of them.

Q. You never heard of it happening in Butte at all? A. I have not.

Q. Haven't you about beating men?

A. I have not. I heard a good deal of gossip on the streets about the third degree. I have no personal knowledge of it, or anything of the sort, nor have I seen it.

Q. What Warner got that day was just about the popular conception of the third degree work?

A. Not my conception of it at all..

Q. You were only there during a part of the interview that day, because you were in and out, you said?

A. Yes, I wasn't there all the time, but I should

(Testimony of E. W. Byrn.)

say I was there possibly one-third of the time, or one-fourth of the time that Warner was in that room.

Q. You were there at the end? A. Yes, sir.

Q. You weren't there at the beginning?

A. No, sir. [149]

Q. How do you know what time he came there?

A. I know when he went into the office.

Q. Although you weren't there?

A. I wasn't in the inner office at the time Warner went in; I saw him going in, but I didn't go in at that time.

Q. What Mr. Wheeler was trying to get Mr. Warner to say was,—what he was interrogating him about was having a private interview with Kelly, or demanding a private interview with Kelly?

A. Yes, sir.

Q. That is what the question *wasn't*?

A. Well, not entirely. There were a number of questions asked him, among them, the question as to how the jury stood.

Q. Mr. Warner first denied having any talk at all with Mr. Kelly? A. Yes, sir.

Q. And then afterwards he weakened and said if he had had? A. He didn't remember.

Q. He didn't remember, you say? A. Yes, sir.

Q. Now, in the first question that Mr. Wheeler put to him that Warner denied, didn't Wheeler ask him if he had a private interview, or request said Kelly for a private interview?

A. That question was asked.

Q. He denied that?

(Testimony of E. W. Byrn.)

A. He denied that. I correct the question by saying, leave out the word "private," that is to say, he didn't use the word "private."

Q. And then your question was asked whether he requested of Dan Kelly an interview?

A. Yes, I merely eliminated the word "private," because [150] I didn't hear the word "private" used in the lobby of the Placer Hotel on that occasion.

Q. That is the question, you think?

A. He denied that, and further denied the question as put by me to the effect that he had requested an interview.

Q. Yes, a private interview?

A. No, I leave out the word "private."

Q. First he requested a private interview, and then that he requested an interview at all?

A. Yes, sir.

Q. And then if he talked to Kelly at all, he didn't remember it? A. Yes, sir.

Redirect Examination.

(By Mr. WHEELER.)

Q. Do you recall his having made a statement,—I will ask you if you recall his having made a statement at that time to the effect that all of the conversation he had with reference to this bill was with Mr. Galen, or with Mr. Gaylor, as he called it?

A. Yes, sir.

Witness excused. [151]

Testimony of Louis A. Haven, for the Government.

Whereupon LOUIS A. HAVEN, a witness called and sworn on behalf of the Government, testified as follows.

Direct Examination.

(By Mr. WHEELER.)

Q. You may state your name.

A. L. A. Haven.

Q. You were a witness in the case of United States of America vs. Alderson, Rae and others?

A. I was.

Q. During the trial of that case, did you know Mr. Warner, the juror there, to see him, the witness that was on the stand this morning? A. I do.

Q. Did you have occasion to see him during the trial of the case, just the night the case went to the jury, during the trial of the case?

A. I didn't see him the night before the case went to the jury; I wasn't here in town.

Q. What night was it, if you recall?

A. I saw him the evening of the day the Government closed its case.

Q. What have you to say as to whether or not you saw him at the Placer Hotel, and about what time in the evening?

A. I saw him in the Placer Hotel around about six o'clock, I couldn't say exactly, but I know I had dinner; it was about six o'clock.

Q. Who, if anybody, was he talking with?

A. Well, he came in to,—Mr. Galen had come into

(Testimony of Louis A. Haven.)

the hotel and was standing near the steps, and looking over toward the office, and this man,—what is his name?

Q. Warner.

A. Warner came in, and went up to him and started talking to him. [152]

Q. And after talking to him, where did they go, what direction did they go?

A. Well, they were standing out a few feet from the steps when they first started to talk, and then they moved over near the steps, and then went over toward the bar-room.

Q. Went over toward the bar-room?

A. Yes, sir.

Q. And I will ask you, Mr. Haven, if it is not a fact that at that time you notified me with reference to the fact that he and Galen had gone toward the bar-room, or gone toward the bar-room, or something to that effect.

By Mr. METTLER.—We object to that as hearsay, and incompetent, irrelevant and immaterial for the purpose of the case.

By the COURT.—It is merely preliminary. He may answer.

Objection overruled.

By Mr. METTLER.—Note our exception.

A. I don't think I ever stated that he went into the bar-room. I mentioned that they went over toward the bar-room entrance, is all I said.

Q. Could you see whether or not they went into the bar-room? A. I could not.

(Testimony of Louis A. Haven.)

Q. What was there to prevent you, if anything?

A. Well, I was sitting about in the middle of the hotel lobby, and from where I was sitting, there is a couple of large pillars, and I couldn't see behind those,—those are rather large, and I couldn't tell where they were going, except the general direction.

Cross-examination.

(By Judge PIGOTT.)

Q. Mr. Haven, what is your business or profession? A. Practicing law. [153]

Q. You say that Mr. Warner went into the hotel, and afterwards Mr. Galen came in? A. No, sir.

Q. Mr. Galen came in first, and then Mr. Warner?

A. Mr. Galen came in first. The reason I noticed it, I happened to be reading the paper, and just getting through, he stood there at the steps just looking around.

Q. And then Mr. Warner came in?

A. Then Mr. Warner came in.

Q. And went up and spoke to Mr. Galen?

A. Went up and spoke to Mr. Galen, and they started to talk.

Q. How far away were you?

A. Well, the steps were thirty or thirty-five feet from where I was sitting, and they were standing, I should judge about four or five feet from the steps.

Q. In the open lobby of the Placer Hotel?

A. Yes, sir.

Q. Pretty well filled with people, I take it?

A. Well, no; there wasn't so many people at that time. They were right there in the open.

(Testimony of Louis A. Haven.)

Q. You don't know what they were talking about?

A. No.

Q. They were not whispering?

A. No, sir, I couldn't say whether they were whispering.

Q. There was no indication that they were talking secrets?

A. No, sir, not to me.

Q. How long did they talk?

A. Well, I should judge that they talked about a minute.

Q. About a minute?

A. That is, when they were standing out several feet from the steps, and then they walked over toward the corner of the [154] steps, and stopped there, I should judge about thirty seconds.

Q. They went toward the street?

A. No, sir, toward the entrance of the bar.

Q. Isn't that toward the street?

A. Oh, yes.

Q. You don't know whether they went through the bar-room, or went out through another door from the bar-room?

A. I don't know anything about that, except they went in that general direction.

Q. Don't a great many people go through that bar-room in order to reach the street?

A. I am sure I don't know what people do.

Q. Without taking a drink at all?

A. I don't know.

Q. At the place you last saw Mr. Galen and Mr. Warner, they might have been going out the main door to the west for all you know?

A. I don't know what the directions are here.

(Testimony of Louis A. Haven.)

Q. This is the west, the main entrance is west; the main entrance of the Placer is west.

A. Well, they were going in a sort of westerly direction toward that corner of the building; I don't know if there is an entrance where they were headed for.

Q. You were a witness for the prosecution in this case? A. I was.

Q. You testified for the Government? A. I did.

Q. In the case against Alderson and Rae and the others?

A. Yes, I was subpoenaed then, and I am now.

Q. When did you first mention this matter to Mr. Wheeler?

A. Well, they came in, Mr. Wheeler and Mr. Baldwin, it was in a little while afterwards, and they mentioned something [155] about going to dinner, and told me to come up to the room, and wash up, while they washed up. I believe it was in the elevator; after they got out, Mr. Wheeler asked me, he made the remark before that he thought the jury had been tampered with, and I just happened to mention that I just saw one of the jurymen down in the lobby, talking to one of the attorneys.

Q. Were you an officer of the Northwestern Trustee Company? A. I was Secretary at one time.

Q. At the time of the failure?

A. Not at the time of the failure. I was Secretary up until August 13th, I believe it was, 1913.

(Testimony of Louis A. Haven.)

Redirect Examination.

(By Mr. WHEELER.)

Q. Just let me recall one question. Do you know where the post is, that is close to the entrance of the bar-room? A. Yes, sir.

Q. And where were these men when you last saw them with reference to that post?

A. Well, they had gone beyond that post, behind the post.

Q. How far is that post from the entrance of the bar-room?

A. I couldn't say, Mr. Wheeler; I think perhaps, it is, oh, three or four feet; perhaps more.

Recross-examination.

(By Judge PIGOTT.)

Q. Isn't there within a few feet of that post the stairway leading down to the toilet-room in the basement?

A. Well, I believe the stairway comes first, Judge, and then the bar.

Q. So, where you saw Galen and Warner, they might have been going down to the basement to the toilet-room, or in the bar-room, or out through some entrance to the street?

A. They might; I couldn't see them after they went behind [156] the post, but, as I say, the post shut out, shut off the view.

Q. Isn't it true that the entrance to the basement to the toilet-room is almost immediately opposite the entrance to the bar-room?

(Testimony of Louis A. Haven.)

A. I have not been in the bar lately.

Q. Don't you pass the entrance downstairs to the toilet?

A. You pass the entrance to the toilet, before going into the bar-room.

Q. They are very near together? A. Yes, sir.

Witness excused. [157]

Testimony of R. R. Sidebotham, for the Government.

Whereupon R. R. SIDEBOTHAM, a witness called by the Government—

By Judge PIGOTT.—I suppose it will be admitted that Mr. Sidebotham, the witness you are about to call, was one of the defendants in the case of the United States of America against Sidebotham and others, that the jury found him guilty of a felony at the present term of this court, that he has been adjudged guilty by this court and sentenced to the penitentiary; that he has not been pardoned, and that the judgment has not been reversed. Do you admit that?

By Mr. WHEELER.—We admit that.

By Judge PIGOTT.—We therefore object to the witness being sworn on the ground that he is incompetent.

By the COURT.—I don't need any authority. I suppose technically this takes on the aspect of a criminal proceeding.

By Judge PIGOTT.—I have the authorities here, your Honor.

By the COURT.—The objection will be sustained.

By Mr. WHEELER.—We will call Mr. Wilmot.

(Testimony of R. R. Sidebotham.)

By Judge PIGOTT.—We object to his being sworn upon the same grounds as were interposed to the swearing of the witness Sidebotham, and I take it that the United States Attorney will admit all the facts as applicable to Wilmot as have been stated with respect to Sidebotham.

By Mr. WHEELER.—We will.

By the COURT.—The objection will be sustained.

**Testimony of Joseph L. Asbridge, for the
Government.**

Whereupon JOSEPH L. ASBRIDGE, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. You are the United States Marshal, Mr. Asbridge? [158] A. I am.

Q. And where were you the night the jury in the United States vs. Rae and Alderson was out?

A. Up in the lobby or corridor, outside of the jury-room.

Q. And where were you, what have you to say as to whether or not you were looking out of the window on the south side of this building? A. I was.

Q. Did you see anybody out there on the street?

A. Yes, I saw three men.

Q. Do you know who they were?

A. One I couldn't distinguish at all, and I am not absolutely sure of the others, except that Mr. Brei-

(Testimony of Joseph L. Asbridge.)

tenstein had come up a few minutes before and told me—

By Mr. METTLER.—We object to what Breitenstein told him as hearsay and immaterial.

A. It was on account of Mr. Breitenstein's statement that I went to the window, and one of the gentlemen stood on the corner of Park Street, Park Avenue, and went back that way. I don't know who he was.

Q. Now, Mr. Asbridge, how long after you had talked with Mr. Breitenstein, did you go to the window?

A. Why, I stood talking to Mr. Breitenstein possibly five or ten minutes, he came up to see if the jury had reported; I went over to the window then, and then I saw these three men outside. Some one went back on Park Avenue, and other two walked up in front of the Federal Building, west, and one of them stayed half way up, and the other went to the corner, and they came back together, and went down town.

Q. Did you come out of the building after that time? A. Not at that time. [159]

Q. How long after that did you come out of the building?

A. It must have been possibly, oh, it might have been three-quarters of an hour, or possibly an hour. Perhaps not over half an hour.

Q. Could you tell who it was out there?

(Testimony of Joseph L. Asbridge.)

A. Well, I thought it was Mr. Rae and Mr. Kelly, but I am not absolutely sure about it.

Q. When you came out of the building, where did you go?

A. Why, I came out of the front steps of the building, I went down Sixth Avenue.

Q. And who, if anybody, did you see?

A. I saw Mr. Kelly on the corner here.

Q. About what time of the morning was it?

A. It must have been between two and three o'clock.

Q. Did you have any conversation with him?

A. He just asked me if the jury had reported yet. I said they had not. He asked me if I had seen Mr. Rae. I told him I was going down town to find out when the jury could have breakfast. I went over to the Eddy cafe. We walked down the street together, until we got possibly to the Eddy cafe.

Q. He asked you if you had seen Mr. Rae?

A. Yes, sir; he walked across the street, and I went into the Eddy cafe.

Q. Was there anything said as to where Mr. Rae had been?

A. No, sir, he said they had been together and got separated.

Q. Did you afterwards have a conversation with Mr. Rae?

A. Why, some time that morning, Mr. Rae said—

By Mr. METTLER.—We object to that as hearsay.

(Testimony of Joseph L. Asbridge.)

A. I did. [160]

By Mr. EVANS.—All these witnesses are here. They can be called.

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Asbridge, in going out, you met Mr. Kelly coming up this way?

A. He was standing right on the corner across the street.

Q. Where did you first observe him, when you came out of the building?

A. When I came out, I saw someone from the window up here (indicating) standing on the corner. Before I came down,—the east window of the building, where the corridor is, by the jury-room.

Q. Was that Mr. Kelly?

A. That was Mr. Kelly; he was still there.

Q. He asked you if the jury had reported?

A. I said no.

Q. And then you walked down town together?

A. Yes, sir.

Q. Who spoke first?

A. I'm sure I don't know.

Q. Mr. Asbridge, where were the three men you saw? Where did you see them?

A. I saw them; the three of them stood on the corner of this corner, Park Avenue and Edward Street, where it goes south.

Q. What street is it,—Clark Street?

A. Well, it was on that corner, the street going

(Testimony of Joseph L. Asbridge.)

west, and the street going south; they stood on the corner.

Q. It is the next street you are speaking of?

A. Yes, it is.

Q. Where, Park Avenue?

A. Yes. I could see them from the window upstairs, and one [161] stood south along Park Avenue, and the two others took the other street, and then walked back, and went down town.

Q. There was a big party at the Montana Club that night. Did you notice people coming and going from there?

A. Not at that time of the morning, I didn't see anyone on the street. I don't remember seeing anybody.

Witness excused. [162]

Testimony of James H. Baldwin, for the Government.

Whereupon JAMES H. BALDWIN, a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. Your name is James H. Baldwin, and you are Assistant United States Attorney? A. It is.

Q. Were you present yesterday afternoon, Mr. Baldwin, when Mr. Warner was up to the office?

A. I was.

Q. Were you present all of the time that he was in the private office?

(Testimony of James H. Baldwin.)

A. I think I was, yes; I was there when he came in, and there until he left.

Q. What have you to say as to whether or not I made this statement to him: That unless he came through, that I would send him to Leavenworth?

A. That statement was not made.

Q. Will you tell the Court what was said at that time?

A. At the time you had been asking Mr. Warner concerning certain statements made by him, and it seemed, from that moment, the moment his story was varying, first he would say that he had a conversation with Mr. Kelly, that he had conversed with Mr. Galen, and would deny that he had a conversation with either one, or both of them. You said to him that he had made so many contradictory statements that you did not know of his damn lies to believe.

Q. What was said to him—

A. And you then went on, he says, "Mr. Wheeler, you seem to want me to say certain things." You said, "I want you to say nothing but the truth." You further said, "When you get on the witness-stand [163] in court in the morning, I want you to tell the truth. I know more about this matter than you think, and if you don't tell the truth, I shall see that you are sent to the Federal Penitentiary at Leavenworth, Kansas,"—that was the statement you made.

Q. Were you present when he went,—when anything was said to him with reference to his having

(Testimony of James H. Baldwin.)

had a conversation in the corridor out here with Mr. Galen?

A. Yes, I was present when you asked him if he had had that conversation, and he denied it, I think.

Cross-examination.

(By Judge PIGOTT.)

Q. Mr. Baldwin, you assisted in the prosecution of the case of the United States of America vs. The Northwestern Trustee Company?

A. To the best of my ability, yes, sir.

Q. Against Rae and these other people?

A. I did.

Q. In the conversation which happened yesterday between Warner and Wheeler, who was present besides yourself and Mr. Wheeler and Mr. Warner?

A. No one else.

Q. Just you three?

A. That is, in the room, there may have been others outside overhearing; I don't know.

Q. Did you have the door open between this room, and this other room?

A. No, sir; we were in the inner room, and the door was closed. We have two rooms in that office. We were in that inner room, and the door to that room was closed at that time.

Q. Didn't Mr. Wheeler tell Mr. Warner in that conversation, [164] in which he called him a damn liar—

A. He didn't call him a damn liar. He said, "If you don't quit telling these damn lies," I think.

(Testimony of James H. Baldwin.)

Q. Then, after he said that, or in that same conversation in which he used that expression, didn't Wheeler say to Warner that he, Wheeler, had three witnesses who would testify to having seen Warner take a drink with Albert Galen, or words in *substance that*?

A. I don't recall such a statement. He said he had witnesses that would testify to it, I think, but I don't recall the three.

Q. Did he name any number of witnesses who would testify to that fact?

A. Not to my recollection, Judge.

Q. But he did say that,—tell Warner, that he, the United States Attorney, had witnesses who would testify to having seen Warner drinking with Galen at the Placer Hotel?

A. I believe he did, and stated generally that he knew more about the case than Warner thought.

Q. And after having told Warner that, he told Warner that if Warner didn't tell the truth, he would send him to the Leavenworth penitentiary?

A. No, sir; I don't think it came up in that way; it is just as I have related it.

Q. In the same conversation?

A. In the same conversation; yes, sir.

Q. Those two expressions were used, those two phrases, "I have got witnesses who will testify that they saw you drink with Galen in the Placer Hotel," and the other statement, that "If you don't tell the truth, I will see that you are sent to the Leavenworth penitentiary"?

(Testimony of James H. Baldwin.)

A. No, sir; I think there were really two conversations, Judge. [165] The reference to the Placer hotel drinking came up during the first conversation. Warner was there twice, but on one visit, and the talk with reference to the drinking in the Placer Hotel was in the first talk. Then Mr. Warner was asked to retire while another party came into the office, and the other statement came later, toward the close of the conversation.

Q. Then Mr. Warner retired at the request of Wheeler to think it over. Mr. Wheeler told him that he had witnesses who saw him take a drink with Albert Galen? A. I think so.

Q. Then after Warner came back, Wheeler told him that if he didn't tell the truth, Wheeler would send him to the Leavenworth Penitentiary?

A. Wheeler told him he had told so damn many different stories that he didn't know which to believe. He said, "When you get on the witness-stand in the morning, I want you to tell the truth, and if you don't, I will see that you are sent to the Federal Penitentiary at Leavenworth, Kansas. That is nearly the wording.

Q. You understood from that, did you not, Mr. Baldwin, that if Warner didn't testify that he had taken drinks with Albert Galen, that Mr. Wheeler would send him to the Leavenworth Penitentiary?

A. Oh, no. Mr. Wheeler wouldn't send any man to the penitentiary.

Q. I am not asking you what you understood by that.

(Testimony of James H. Baldwin.)

A. I am telling you what I understood. I understood that we wanted the man to tell the exact truth. That is all we ever asked him to do. I understood that if he told stories upon the stand which we could contradict by a sufficient number of competent witnesses, that we would try to have him indicted. That is what I understood, and I still understand it.

Q. You and I don't disagree about that at all. We arrive at [166] the same conclusion. Mr. Baldwin, who are those witnesses that Mr. Wheeler had?

A. Now, Judge Pigott, I am not certain. I can tell you some, as to this conversation in the—

Q. I am asking you who those witnesses were, who would testify that they saw Warner take a drink in the Placer Hotel. The men that Mr. Wheeler meant when he told Warner that he had witnesses who would testify to that fact.

By Mr. WHEELER.—That is objected to as being improper cross-examination, and argumentative.

By the COURT.—The objection will be sustained to the last question.

By Judge PIGOTT.—Note our exception.

Q. Mr. Baldwin, do you know the witnesses, or any of the witnesses to whom Mr. Wheeler referred when he told Warner that he had witnesses that would testify that they saw Mr. Galen and Mr. Warner taking a drink in the Placer Hotel?

A. I am not certain as to that. I will say that I knew one that he was depending on. I will say that the case was finished on Saturday evening. I went

(Testimony of James H. Baldwin.)

home to Butte that night, and I didn't return until the following Thursday, and the preparation for this special matter was all made during my absence.

Q. Did Mr. Wheeler tell you of the witnesses?

A. Mr. Wheeler understood, just as I did, that when Mr. Haven spoke to us of Mr. Warner and Mr. Galen having a drink, he told us that he had seen them in the bar. I personally believed that Mr. Haven would testify to that fact. That was my understanding of his statement when he told Mr. Wheeler and I that he had seen Mr. Galen and Warner having,—taking a drink at the bar-room at the Placer.

Q. The Mr. Haven you refer to is the man who testified [167] a little while ago?

A. Yes, he is the man.

Q. Who said he saw Galen and Warner going in the direction of the bar-room, or they might have gone to the basement, or through the entrance of the bar-room, that is the same witness, is it?

A. Yes, sir.

Q. Do you mean to say that Mr. Haven told you or Mr. Wheeler that he saw them taking a drink in the Placer Bar? A. That is the impression I got.

Q. Now, that is one witness. Do you know of any other witness?

A. No, I don't know of any other at this time.

Q. Or at any other time?

A. I have never heard any suggestion.

Q. So Mr. Haven is the only witness so far as you

(Testimony of James H. Baldwin.)

know whom you thought would testify that he had seen Galen and Warner drinking in the Placer Hotel?

A. I thought,—that was the impression he wishes to convey. I never spoke to him from that time to this with reference to the matter, and did not know what he would testify to.

Q. If that was the impression you got, how could you get that impression, when Mr. Wheeler used the plural, witnesses, instead of the singular, witness,—

By Judge PIGOTT.—Oh, I misunderstood the witness. I will withdraw the question.

By Mr. EVANS.—If the Court please, we would like to recall Mr. Warner for one question.

By the COURT.—You may do so.

**Testimony of W. B. Warner, for the Government
(Recalled—Cross-examination).**

Whereupon Mr. WARNER was recalled for further cross-examination.

(By Mr. EVANS.)

Q. Mr. Warner, in your meeting with Mr. Wheeler yesterday, [168] when you went to his office in response to his telephone call, I will ask you if he told you at that time that he had three witnesses that would testify that you and Mr. Galen went into the Placer Bar, and took a drink?

A. Yes, sir.

Redirect Examination.

(By Mr. WHEELER.)

Q. I asked you, at that time, didn't I, Mr. War-

(Testimony of W. B. Warner.)

ner, if it was not a fact also that you were present in the bar-room when Mr. Houston was in there, and if you didn't take a drink with Mr. Houston, or didn't take a drink with Mr. Galen when Mr. Houston was in the bar-room?

A. I am very sorry, I don't know Mr. Houston by name.

Q. Do you recall my having asked you that question? A. No, sir.

By Judge PIGOTT.—Will your Honor indulge us for a few moments?

By the COURT.—We will suspend until to-morrow morning.

Government rests.

Whereupon the hearing was continued until Thursday morning, February 8th, 1917. [169]

Thursday Morning, February 8th, 1917.

DEFENDANTS' CASE.

By the COURT.—Gentlemen, you may proceed.

By Mr. METTLER.—We would like to recall Mr. Kirshwing for further cross-examination on one point.

By the COURT.—Is he present? He isn't here, apparently.

By Mr. METTLER.—We desire to further cross-examine Mr. Joe Kirshwing to show further the situation that occurred there.

By the COURT.—He don't seem to be here at the present time.

By Mr. WHEELER.—I don't know that it is proper to cross-examine the witness after we have

(Testimony of W. B. Warner.)

closed the case. He isn't here at the present time, but he is probably down to the hotel. You can get him by telephone.

By the COURT.—Proceed.

By Mr. METTLER.—We will have Mr. Kirshwing here.

By the COURT.—If you can find him.

By Mr. METTLER.—He has not been excused from attendance by us.

By the COURT.—Your case has been closed.

By Judge PIGOTT.—May the Court please, if this were the case of an ordinary layman, under the charges, feeling as we do that there has not been sufficient proof to satisfy the Court beyond a reasonable doubt as to the guilt as charged in the information, we would make a motion to discharge, for the discharge of the order to show cause, or a dismissal of the proceedings, or in the alternative, in a finding of not guilty, however, as your Honor well knows, the contemnors are officers of the Court, and as such have in their keeping, to a great extent, the honor and dignity and integrity of the court, and we feel that even where there is a shadow of suspicion which is thrown upon or attaches to a member of the bar, it is his duty if he be worthy to practice law to make [170] a full explanation of all that he has done, to remove that suspicion. For that reason, we propose at this time to enter upon our defense in explanation of this shadow of suspicion that was made, if it may be called that.

Testimony of J. L. De Hart, for Defendants.

Whereupon J. L. DE HART, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. EVANS.)

Q. Give your name in full, Mr. De Hart, please.

A. J. L. De Hart.

Q. Where do you reside? A. Helena.

Q. What, if any, official position are you occupying, Mr. De Hart?

A. I am connected with the State Game Department.

Q. What is your position?

A. State Game officer, State Game Warden.

Q. You are the head of that department, then?

A. Yes, sir.

Q. And have been for how long?

A. Something over three years.

Q. You conduct its affairs from the capitol here at Helena? A. Yes, sir.

Q. Mr. De Hart, do you know Mr. Charles Brown? A. I know the gentleman; yes, sir.

Q. The rancher who lives just below Jefferson City, and was on the jury in the United States—Sidebotham case? A. Yes, sir.

Q. How long have you known him?

A. Going on two years, by sight, not intimately acquainted with him. [171]

Q. Now, Mr. De Hart, do you recall during Janu-

(Testimony of J. L. De Hart.)

ary, about the 24th, of Brown, seeking you out and conversing with you about polluting the water in that stream out near his place? A. Yes, sir.

Q. How many interviews did you have with him about that time, if you recall?

A. Well, I had four interviews with him altogether, concerning that matter. I think about the first of January I had one.

Q. Where was that?

A. The first one I had with him was in my office, the next one was in the hotel, the Eddy, and the next one was across the way in the Placer.

Q. The third was in the Placer Hotel?

A. Yes, sir.

Q. And where was the fourth?

A. At my office.

Q. At your office? A. Yes, sir.

Q. The conversation on each of those occasions, without going into detail at all, was about this, was an appeal to you to try and do something toward trying to clarify the water out there?

A. Yes, sir.

Q. Taking it up on the ground that perhaps you had jurisdiction because of the fish?

A. Yes, sir.

Q. You had one conversation or interview with him in the Placer Hotel, you are positive of that?

A. Yes, sir; that is all.

Q. Where did you start talking with him on that occasion?

A. If I remember correctly, Mr. Brown was sit-

(Testimony of J. L. De Hart.)

ting in the chair near that post at the entrance to the bar, opposite to the entrance to the bar when I came in, and he stopped and talked [172] a few minutes.

Q. That was in the lobby?

A. That was in the lobby, and we walked into the bar, had a drink, or a cigar, I wouldn't be positive which.

Q. You started your conversation talking there in the lobby, and continued, went on into the bar, and had a drink, or a cigar? A. Yes, sir.

Q. Do you remember with whom?

A. There was not anyone took a drink with us that I know of, except the two of us. There were other people came in when we were in, I don't recall to mind that there were a great many in, but there were quite a number came in during the time we stood there, which was but a few minutes.

Q. Now, Mr. De hart, was that the only time you had a conversation with Mr. Brown in the Placer Hotel, lobby?

A. I never had but the one conversation with him in the Placer Hotel.

Q. I will ask you if you are positive that is the only time you were at the placer bar with Mr. Brown.

A. Well, that is the only time I call to mind. I think perhaps I would remember, from the fact that we were talking this over is the reason I remember this.

Q. Now, when you were conversing in the lobby,

(Testimony of J. L. De Hart.)

was Mr. D. M. Kelly there, that is, in your conversation was he immediately around you?

A. I didn't see him; I don't call him to mind.

Q. Do you think you would if you had been there and engaged in your conversation?

A. I might, yes, I think I would; but I don't know that I do, at least, I don't call him to mind.

Q. What is your impression, whether he was there, or not [173] in your conversation?

A. I don't think he was; he might have been in the lobby, but I didn't see him that I call to mind.

Q. Did you see Mr. Kelly at the bar?

A. I did not,—not that I know of now.

Q. If he were there, you didn't notice him?

A. No, sir.

By Mr. WHEELER.—We object to the question as leading and suggestive. There is no reason why this witness should be led all the time.

By the COURT.—Objection overruled. He may answer.

By Mr. EVANS.—May he be excused?

By Mr. WHEELER.—I don't know what the purpose of his testimony is, I don't want to excuse him, until I know what the testimony is for.

By Mr. EVANS.—I will ask the Court that Mr. De Hart may be excused.

By the COURT.—Oh, yes; I don't see where you will need him again.

Witness excused. [174]

Testimony of Albert J. Galen, in His Own Behalf.

Whereupon ALBERT J. GALEN, a witness called and sworn on his own behalf, testified as follows:

Direct Examination.

(By Mr. METTLER.)

Q. Your name is Albert J. Galen? A. Yes, sir.

Q. You are the person named in the information which is under investigation here at the present time? A. I am one of the persons named.

Q. How old are you, Mr. Galen?

A. Forty-one last January.

Q. How long have you lived in Montana?

A. All of my life.

Q. How long have you lived in Helena?

A. As long as I can remember.

Q. You are a member of the bar of this court, are you? A. Yes, sir.

Q. How long have you been a member of the bar of this court? A. Nineteen years.

Q. You are a member of the bar of the Supreme Court of this State? A. Yes, sir.

Q. For how many years have you been such a member? A. Nineteen years.

Q. I will ask you to state if you are a member of the bar of the United States Supreme Court?

A. Yes, sir.

Q. How long have you been such a member?

A. I was admitted in the,—to the bar of the Supreme Court of the United States in January, 1907.

(Testimony of Albert J. Galen.)

Q. What official position, if any, have you occupied in the State of Montana? [175]

A. I occupied the position of Attorney-General for the State of Montana from January 2d, 1905, until January 5th, 1913.

Q. Have ever any similar proceedings to those at bar, ever been instituted against you in any court?

A. They have not.

Q. You were one of the attorneys in the case of the United States against Alderson, Rae and others, were you not?

A. Yes, I was associated with Mr. D. M. Kelly for the defense of the defendants Rae and Alderson.

Q. How many defendants were there in that case altogether, on trial?

A. I think there were ten on trial. There were fifteen or sixteen charged in the indictment, but only ten came on for trial.

Q. How many attorneys were there in that, and name the attorneys that were engaged in the trial of that case.

A. There were several attorneys, I cannot say the number but I can probably recount them. There was Judge Henry C. Smith representing Sidebotham and Wilmot, Miss. M. A. Cort, and a man by the name of Rainwater. There was Mr. McDonough and Stephen Cowley and Judge Callaway representing J. W. Speer. There was A. H. McConnell representing a man by the name of White, and D. M. Kelly and myself representing the defendants Rae and Alderson.

(Testimony of Albert J. Galen.)

Q. Lamb?

A. And E. M. Lamb of Butte representing D. G. Bertoglio.

Q. How long did that trial last?

A. That trial lasted from the 15th of January, on, for a period of two weeks, ending at the conclusion of the second week on Saturday, by return of the verdict of the jury, which verdict was returned—
[176]

Q. 27th, wasn't it,—January 27th?

A. January 27th, in the morning of January 27th.

Q. I will ask you if you are a man of family?

A. Yes, sir.

Q. Who does your family consist of?

A. My wife and one boy.

Q. I will call your attention now to the testimony brought out by the witness Warner, in which he stated that you spoke to him one time in the Placer Hotel when he was speaking to Mr. Alderson. You may state to the Court the circumstances in connection with that matter in your own way.

A. Mr. Warner approached me three separate times, there was only three occasions during the trial when I spoke to him at all, or he spoke to me at all, more than to possibly say how-do-you-do in passing. The first occasion was in the Placer Hotel in the evening somewhere, I should say, along between the 19th and 23d, I am not sure as to the date, but I am positive as to the only time that I ever spoke to him; I was in the Placer Hotel with Mr.

(Testimony of Albert J. Galen.)

A. M. Alderson, one of the defendants, and Mr. Frank C. Walker, an attorney from Butte, conversing with them. My attention was attracted to some matter by Mr. Walker, as I recall it, something that he wishes to talk to me personally about, and I thus removed a few feet from Alderson, say three or four feet, when the juror Warner entered the hotel, coming in the front door, going from west,—easterly to the center of the lobby, where I had left Alderson standing, and at that time, Mr. Frank Walker and myself were removed a distance from Alderson of approximately eight or nine feet. Warner approached Mr. Alderson, who was one of the defendants in the case, and whom I represented, and started to speak to him. They were not close together, but were separated [177] by a distance of approximately two feet, and when I saw the incident, I said to Mr. Walker, "I am going to tell Warner that he better not talk to one of the defendants in this case." And I thereupon turned and approached Warner, and said to him, "Mr. Warner, I would rather you would not talk to Mr. Alderson; he is a defendant, and you ought to appreciate the situation; please do not do that." He said, "Is there any objection to talking to you?" I said, "No; what is on your mind?" He said: "Do I smell bad, or have I got some disease that I cannot talk to anybody?" I said, "No; now, what is it Warner?" We walked from that point away from Alderson to the balustrade on the stairway going up from the lobby north toward the elevator and the

(Testimony of Albert J. Galen.)

dining-room in the Placer Hotel, which would be the west balustrade, the one nearest to Main Street, and there I stopped.

Q. Just a moment. At this point, I want to ask you how long have you known this juror Warner?

A. I saw him for the first time in this courtroom on January 15th, when he was called into the jury-box.

Q. When was the first time you ever spoke to him; or he ever spoke to you?

A. As I have stated, the first time I ever spoke to him was in the hotel that night, as I was attempting to narrate. We went to this post at the balustrade after he had indicated a desire to speak to some one, and asked if there was any objection to speaking to me. I said, "What is on your mind?" He said, "I am interested in a railroadman's bill, and I was wondering if you knew any railroad men in the House of Representatives. I said, "Yes, Mr. Searles is a railroad man; I think he works for the Milwaukee." That is all was said. I immediately left him. I don't know where he went, and [178] I don't know where I went, but I do not think that I went into the Placer Bar.

Q. You may state with reference to your next speaking with him, the next morning, what, if anything, was said then?

A. When I came into the courtroom the morning afterwards, the juror Warner in passing me stopped and said to me, "After the call-down you gave me

(Testimony of Albert J. Galen.)

last night, I hardly slept any; I should have known better."

Q. And reverting now to the night before, when you had this conversation with him, can you say about what time it was, the time of the evening?

A. I wouldn't be sure. I know it was in the evening. I didn't have anything to fix it on my mind whether it was before supper, or after supper. I am in the hotel and out so much that I am unable to fix the hour.

Q. What have you to say as to whether there were other persons present in the lobby of the hotel at that time?

A. The lobby was crowded, as it is usually in the evening. There was quite a crowd of people about, and I know that there were many special agents, and representatives of the Government, too.

Q. I will ask you to state to the Court whether,—what your purpose was in approaching the juror Warner at the time that you stated that you did approach him when he was talking to Alderson?

A. I think the purpose is self-evident. I didn't wish to have any suspicions cast upon a man whom I was defending in this court.

Q. Did you have any purpose in improperly influencing the action of this juror in the defense of that case then under trial? A. I did not.

Q. Now, you may state the next time that you had a conversation [179] with the juror Warner, and the circumstances, place and time?

(Testimony of Albert J. Galen.)

A. Well, immediately, the next time would have been, as he passed me, going into the jury-box the next morning. The next occasion that I had in mind when I said three times, and in making the statement of three occasions, I had not taken in account his speaking to me the morning after the first incident in the Placer Hotel lobby. The next occasion was the night of January 25th in the Placer Hotel lobby. I was standing in the lobby near the clerk's desk, the lobby was crowded, and the messanine floor was filled with people. There was an auction sale being conducted of furs. Mr. Cramer of Great Falls was acting as the auctioneer, and the crowd was mostly standing up, although I presume some may have been around in the chairs. At that juncture, the constable of Helena Township, Mr. —

Q. Hageman?

A. Hageman came in and approached the auctioneer and apparently stopped the sale. At any rate, Mr. Cramer, whom I knew, and who had been attempting to get a bid from me as one of those in the audience with whom he was acquainted, called me forward, and I went through this crowd, elbowed my way through up to Mr. Cramer, and Mr. Cramer took me to Mr. Diamond at the fur counter.

Q. Who was Mr. Diamond?

A. Mr. Diamond was the man who owned these furs, and they wanted to arrange with me to defend them on a hearing the next morning, in the Justice Court. I advised them that I was engaged in the Alderson and Rae trial, and it would be impossible, and told

(Testimony of Albert J. Galen.)

them to go to my office in the morning. I wish to say that the auctioneer's stand was in [180] the center of the lobby, removed to the right of the main entrance of the door, that is, in a southerly portion of the big main lobby, and probably ten or twelve feet distance from a direct line with the clerk's desk, and then on the west side of the auctioneer's stand, there was a long flat table upon which the furs to be sold were exhibited. It was to this table that Mr. Cramer brought me. I told him my position. Told Mr. Diamond my position, and likewise Mr. Cramer and suggested that they go to the office in the morning. Mr. Diamond thereupon held up a Hudson seal coat, and made comparison of that coat with one that he knew my wife purchased at one of the local stores, and that was laid down, and I started to leave, and as I did, Mr. Warner handed a paper to me, or a roll of papers, which I looked at. He said, "Look at that." I turned it open, I opened it, and read the title to it, which was a bill providing that railroads should have cars in ill-repair repaired within the State of Montana. And I simply looked at the title, and handed it back to Mr. Warner and went off.

Q. I will now show you, Mr. Galen, a paper which has been marked "Defendants' Exhibit 1." The paper which was identified by the witness Warner when he was on the stand, and ask you to look at that. You may state whether as near as you can remember, whether that or some similar paper was handed to you at that time.

A. I would say that it was this, or some similar

(Testimony of Albert J. Galen.)

paper. At that time I only looked at the title, I didn't even look to see who the bill was introduced by, or anything further.

Q. Now, when that was handed to you, Mr. Galen, you may state what you said and did.

A. My recollection is that I merely said, "I haven't got [181] time to fool with that," and immediately walked away from him.

Q. And you handed the paper back, you say?

A. Yes, sir.

Q. You may state when you saw this juror Warner.

A. As I already stated, I saw him for the first time in the morning the Alderson and Rae—

Q. I am speaking of now, when you first saw him on this occasion of the fur sale, when you first saw him on the occasion of the fur sale?

A. I didn't see him until he poked the paper up to me when I was talking to Mr. Diamond.

Q. You may state whether or not then it is a fact that you knowingly approached him.

A. It is not a fact. I didn't know of his presence, until he handed me the paper.

Q. Do you know the special agent, Mr. Byrne, who was on the stand?

A. I never knew him to see him, or otherwise. I never had my attention called to him until he was on the stand here yesterday. I had not paid any attention to him.

Q. So that you don't know whether he was there, or not? A. I do not.

(Testimony of Albert J. Galen.)

Q. Do you know Mr. Haven?

A. Well, I know Mr. Haven, yes, slightly. I saw him on the witness-stand. I think I met him in Butte, I don't know him.

Q. Now, on the occasion of your talking to Mr. Warner near the steps, after you had spoken to him when he was talking to Alderson, did you at that time see Mr. Haven? A. No, sir; I did not. [182]

Q. He might have been present in the hotel there at that time, and you not have seen him?

A. Yes, sir.

Q. Did you at that time, after talking with Mr. Warner as you have testified near the stairway, go with Mr. Warner into the bar-room? A. I did not.

Q. Did you ever go into the bar-room,—did you ever go into the bar-room with Mr. Warner?

A. I did not.

Q. Did you ever take a drink with Mr. Warner in the bar-room during the progress of the trial?

A. I did not.

Q. Did Mr. Warner ever take a drink with you?

A. He did not.

Q. In the bar-room, or anywhere else?

A. No, sir.

Q. Did you ever take a drink with any juryman in that case?

A. I did not excepting that I was present the night that Mr. Brown was there when Mr. Wheeler was there, and Mr. Rankin, but I didn't take any drink at the time that Mr. Brown was there.

Q. I will take that up later. You may state the

(Testimony of Albert J. Galen.)

next time that you had any conversation with Mr. Warner, or he with you, under what circumstances?

A. The next time that I had any conversation with Warner was on Friday during the argument of Mr. Wheeler to the jury. In the midst of his argument a recess was asked and granted, and the jury filed out from the jury-box to this door from the courtroom on the west side, and after the jury had gone out, I got a cigarette from Mr. Alderson or Mr. Rae, and I was somewhat nervous as the result of the strain of the trial, and when I was able to get by those who were blocking [183] the way behind me, I walked into the corridor, and was smoking and looking down into the areaway or light-well along the land office, just along the other side of this hall way to the west.

Q. How far is that window of that light shaft from the door leading from the west part of this courtroom?

A. Why, I should say about six feet, and while I stood there smoking, and as I probably in a meditative mood, and somewhat nervous, Mr. Warner stepped up to me,—there were many people in the corridor all around, the jurors, I didn't pay any attention to who they were. He said, "I want to talk to you about my bill." I said to him, "For Christ's sake, wait until this trial is over." That was all that was said. I wish further to say that I didn't talk to Mr. Warner in the courtroom. I didn't whisper to Mr. Warner in the courtroom, nor Mr. Warner to me at the time of that adjournment before we went into the hallway.

(Testimony of Albert J. Galen.)

Q. I will ask you if you heard the testimony of Mr. Kirshwing on yesterday, if you heard his testimony to the effect that this juror Warner at a point which he indicated would be about where the district attorney is now sitting, whispered to you. You may state whether or not that is true or false?

A. That is absolutely and unqualifiedly false.

Q. You also heard his testimony to the effect that after the juror had so whispered to you, you followed him out to the corridor. You may state whether or not that is true, or false.

A. That is false.

Q. Now, you may state how the tables were arranged. You also heard the testimony of the witness Kirshwing to the [184] effect that you had your arm around, or your arms around the juror Warner. You may state whether that is true or false? A. That is false.

Q. You may state now the arrangement of the tables at which counsel for defendants were sitting at the time of the five minutes recess during the argument of Mr. Wheeler, when this incident occurred that you have just referred to?

A. Shortly after this trial of the United States against Rae and Alderson commenced, on January 15th, by permission of Court, for convenience of counsel and their clients, considering the number in the case, the tables were placed parallel in a northerly and southerly direction in this court, that is, lengthwise with the courtroom, and the tables were not together in the position that they now are, end

(Testimony of Albert J. Galen.)

for end, and sideways in the court, but they were placed as I have said, parallel.

Q. How wide a space between them?

A. The space between them was approximately two feet.

Q. With reference to the space between them where were you seated at the time of this five minutes recess during Mr. Wheeler's address?

A. The table which was to the east side of this courtroom, I was seated on the west side of that table, directly behind Mr. Kelly, and the end of that table was almost against the reporter's stand, and to my right and front from me,—opposite Mr. Kelly and on the west side of the other table, Mr. Rae sat, and immediately behind Mr. Rae was Mr. Alderson, Mr. Alderson being to my right, and behind me was seated Stephen Cowley, and on the other side behind Alderson was Judge Calloway, and then toward the end of the table, they blockaded the end, was Judge Callaway and Miss Cort and Judge Smith. [185]

Q. And Mr. McDonough?

A. And Mr. McDonough and Speer. I was in a pocket there in consequence of the two tables thus being arranged.

Q. As I understand you this two foot space between the two tables was completely filled with attorneys and their clients from one end to the other?

A. Yes, sir.

Q. And that you were not at either end of it, but rather in the middle, rather toward the front end?

A. I was at the front end of it nearest to the reporter's stand.

(Testimony of Albert J. Galen.)

Q. I will ask you what you have to say as to the possibility of easily getting out of the place where you were sitting?

A. It was very difficult for me to get out until some of those behind me had moved out of this narrow space.

Q. I will ask you on this particular occasion where you were at the time that the jury filed out of the court, during the five minute recess that you have spoken of, during Mr. Wheeler's address?

A. I was seated directly behind Mr. Kelly, and I didn't leave my position behind Mr. Kelly, until after the jury had all gone in the hallway.

Q. When you got up, as you say, left your position, took a cigarette and started out in the corridor, did you see Mr. Warner?

A. I did not. I didn't pay any attention to anybody. I was thinking of the case, and worried and walked to the window there and looked down into the areaway—

Q. After the jury had left the jury-box on this occasion, when was the first time that you saw Mr. Warner? A. You mean after the verdict? [186]

Q. After the jury, during the five minutes recess, after they left the jury-box?

A. At the time he approached me in the hallway?

Q. Yes.

A. I saw him when he walked up to me, I had not seen him out in the hall, I had not paid any attention to him as he went out.

Q. I will ask you if at any of these times that you

(Testimony of Albert J. Galen.)

have testified about, at which you spoke to Mr. Warner, or he spoke to you, there was anything whatsoever said about the case then on trial?

A. Absolutely nothing.

Q. Did you ever speak to any juror in attendance upon that trial about the case under consideration? A. I certainly did not.

Q. Now, you have related three particular occasions upon which conversations were had with this juror Warner. I will ask you if there was any other occasion than those which you mentioned, that is, four, counting perhaps, the remark made to you here in the courtroom?

A. Mr. Warner, one morning, I believe it was the morning after the night that I first met him in the Placer Hotel, asked me the name of the man that I had mentioned to him when I said Searles, and at that time Mr. Warner was standing next to Mr. Wheeler speaking to me across the table. He asked a polite question and I answered it.

Q. Searles was the name of the man that you had given him the night before, there, in the hotel?

A. Yes, sir.

Q. I will ask you if on any of these occasions in which you spoke to Mr. Warner, or he to you, there was any attempt on your part to conceal the fact that you were so talking to him? [187]

A. Absolutely not.

Q. Did you ever talk to Mr. Warner, or he to you, when there were not other persons in the close vicinity of where you were speaking?

(Testimony of Albert J. Galen.)

A. No, no, not at all.

Q. Did you ever at any time search out, or approach Mr. Warner of your own accord?

A. I certainly did not.

Q. Now, reverting, Mr. Galen, to the incident that you spoke of in the bar-room when you said you were present at the time that the juror Brown was there. Tell the Court what occurred there, as you remember it.

A. I had been working with Mr. Kelly in my office until quite late that night, I don't know exactly the hour, but somewhere near eleven o'clock. We came across from my office to the Placer Hotel.

Q. How far is your office from the Placer Hotel?

A. Oh, about half a block, my office being in the Galen Block at the foot of Broadway, and the Placer Hotel being down the street a distance of about four hundred feet from Broadway.

Q. On the opposite side of the street?

A. On the opposite side of the street. I went with Mr. Kelly to the Placer Hotel, and we proceeded into the bar-room together. We got in there, the place was crowded. I lost Mr. Kelly in the center of the bar, and I proceeded along the bar, from east to west, looking them over to see who was there. I turned around and started back out toward the east, paying no more attention to Mr. Kelly. I noticed Mr. Rankin and Mr. Wheeler standing at the end of the bar.

Q. That was Mr. Wheeler, the district attorney?
[188]

(Testimony of Albert J. Galen.)

A. That was Mr. Wheeler, the district attorney.

Q. And Mr. Rankin, the attorney who was on the stand yesterday?

A. Yes; they were at the east end of the bar, way to the extreme end near the toilet in the bar-room, and I approached them, spoke to them just as I ordinarily would do to attorney friends of mine, or associates. Mr. Wheeler asked me to have a drink, and I thanked him, and I said I didn't care for anything to drink. I continued talking to Mr. Wheeler and Mr. Rankin. My back was toward Main Street, that is, I was facing in an easterly direction, when I was talking to Mr. Rankin and Mr. Wheeler at that juncture I heard Mr. Kelly's voice say, "Wheeler, have a drink," and I looked then, and there were several people to my left. I was between Mr. Rankin, Mr. Wheeler and Mr. Kelly, and there were two or three between Mr. Kelly and myself, and at that time I saw the juror Brown either back of Mr. Kelly or along side of him, at any rate, he was in the crowd. Mr. Wheeler said to me, "I think that is careless on Mr. Kelly's part to be with a juryman that way," and, I said to Mr. Wheeler, "He means no harm," and Mr. Wheeler stepped back, and I stepped back with him toward the door, that would be away from the bar, and toward the Placer Hotel lobby. Mr. Rankin went out, Mr. Brown went out. Mr. Stephen J. Cowley of Great Falls, who was one of the attorneys for the defendant Speer in the trial of the United States against Alderson et al., stepped forward toward Mr. Wheeler, and Mr. Kelly did so

(Testimony of Albert J. Galen.)

likewise. It was then my intention to speak to Mr. Kelly as to what had been said to me by Mr. Wheeler concerning the drink incident when Brown was present, and before I could say anything, Stephen Cowley said something concerning it, and Mr. Wheeler said, "That don't look good to me, and probably wouldn't look very good to the Court," and Mr. Kelly said, "Well, you know, [189] there was no harm or intention in this; I have known Brown for a long time, and"—

Q. Did he say anything further about what kind of a man Brown was?

A. Oh, yes; he said Brown is a high-class citizen, and a drink wouldn't bother him. Mr. Wheeler said I know that. I might in addition, I may state further with reference to that incident that after Mr. Rankin had gone out, and after Mr. Brown had gone out, and after we had thus conversed together, Mr. Wheeler, Mr. Kelly, Mr. Cowley and myself, then Dan Kelly bought a drink, and Mr. Wheeler and all of us had a drink with him.

Q. How long had you known the juror Brown?

A. Oh, I don't know; I have known Mr. Brown a great many years. I have known where his ranch is and have been there. I have known him intimately for the last ten years.

Q. Did you ever at any time during that trial observe any of the other jurors drinking with any of the attorneys in the case, any time during that trial?

A. I did not, and I wish to say, moreover, that I started in to the trial, as one of the attorneys deter-

(Testimony of Albert J. Galen.)

mined to keep entirely away from any possible suspicion or talking to anybody, or anything of the kind.

Cross-examination.

(By Mr. WHEELER.)

Q. Mr. Galen, just one or two questions. The incident with reference to the bar at the time that you and I and Rankin were talking together at the end of the bar, in the Placer Hotel, let me ask you if it isn't a fact that there was a long space where there was not anybody standing just before Kelly and Brown came up? [190]

A. I don't know as to that. The bar was quite crowded in accordance with my recollection.

Q. You wouldn't say that the bar was quite crowded at that time?

A. I know it was quite crowded at the time I went up to the bar, and before I came down to talk with you.

Q. Do you recall, Mr. Galen, the position in which we were standing at the corner? A. Yes, I do.

Q. I will ask you if it isn't a fact that I was standing right at the end? A. Yes, sir.

Q. Mr. Rankin next to me? A. Yes, sir.

Q. And you were standing facing me, or kind of with your back toward the door?

A. My recollection of our relative positions, was that Mr. Rankin was the one at the end, and you were next, and when I came up to you, I stood back of you, just between you, that would be my recollection of your position.

Q. Do you recall at that time of seeing Mr. Brown

(Testimony of Albert J. Galen.)

and Mr. Kelly come in the bar together?

A. I didn't see them come in together. Mr. Kelly came in with me. I didn't know where Mr. Kelly went, and the first that I saw of Mr. Brown was when you called my attention to him.

Q. How long before that had Kelly come into the bar with Mr. Galen?

A. I don't know; it was only a short time, because I had not stopped to talk to anybody, only to go to the end of the bar, and then come back and stop to talk with you. [191]

Q. Isn't it a fact that the only people in the bar-room at the time that you were talking with Mr. Rankin and myself, were some people down at the other end of the bar?

A. I would say that is not the fact, because there were quite a number of people in the bar.

Q. Wouldn't you say the fact was, Mr. Galen, would you say that you saw Mr. De Hart there at all, when we were talking?

A. I wouldn't say that I did.

Q. Then he was not in the bar that evening while you and I were there?

A. He might have been there, but I don't remember seeing him.

Q. Now, the only person who was standing at the bar at the time that this drinking incident took place with Mr. Kelly was Mr. Brown who was standing on the further side of Mr. Kelly, was it not?

A. Either the further side, or behind him. I thought he was behind him.

(Testimony of Albert J. Galen.)

Q. Let me call your attention; first, was Mr. Brown,—that is, he was on the west side, and then Mr. Kelly and then Mr. Cowley came up and stood between you and Mr. Kelly, did he not?

A. Well, the only time I remember Mr. Cowley was when he approached us after you called my attention to Mr. Brown being there.

Q. Don't you recall Mr. Cowley being at the bar at the time that the drink was bought by Mr. Kelly?

A. Why, he may have been there, but I don't recall his being there. There was quite a number there until he came forward, and up to that time I didn't pay any attention to him. I probably would not have noticed Brown, excepting for your calling my attention to him.

Q. Your back was really turned toward Brown at the time [192] I called your attention to them?

A. Yes, sir.

Q. And said to you that Kelly was making a fool or damn fool of himself, or something to that effect, in buying a drink for a juror. Wasn't that the remark I made? A. Well, in the substance that.

Q. Now, would you say that M. Kelly didn't come out of the lobby of the Placer Hotel with Mr. Brown?

A. Well, I didn't see him, Mr. Wheeler. He came in with me.

Q. He came in. He came in with you on the first occasion? A. Yes, sir.

Q. Mr. Galen, that must have been at least twenty or thirty minutes prior to the time that the drink was had there between you and I, or between Mr. Rankin

(Testimony of Albert J. Galen.)

and I when you were standing there talking to me, was it not?

A. I don't think so. I think it would be an appreciably short time. I had nothing to charge my memory with the time, it couldn't have been very long because as I recall it when I went to the far end of the bar, to the west end, I had no occasion to stop there, and did not stop until I joined you.

Q. You didn't loose Mr. Kelly any more in the bar-room at all that night?

A. When we came into the bar, Mr. Kelly dropped into one of those booths on the side, or else probably stopped in the center of the crowd at the bar, I didn't pay any attention to him, and I didn't see anything more of him then.

Q. You didn't know where he went?

A. No, sir.

Q. He probably went into the lobby of the hotel?

A. If he did, I didn't see him. [193]

Q. You didn't see Mr. Brown in the bar-room at all at that time?

A. The first time I saw Mr. Brown was when you called my attention to him, in the bar-room.

Q. Don't you recall my having made some remark about Mr. Kelly coming in with the juror, as he came into the door? A. I do not.

Q. You haven't any recollection of any such thing?

A. No, sir.

Q. Do you have a recollection when Mr. Kelly introduced Mr. Brown to Mr. Cowley?

A. No, sir.

(Testimony of Albert J. Galen.)

Q. Do you recall my saying something to Mr. Cowley about it?

A. I recall Mr. Cowley saying something to you, and then we were all together, and there was a discussion between you and Mr. Cowley about the propriety of the thing.

Q. Well, before that time when they were standing at the bar?

A. I don't remember anything about my introduction, or anything else being said about it.

Q. Isn't it a fact that you did introduce this man Warner to some of the legislators?

A. If I did, I have no recollection of it, Mr. Wheeler.

Q. Would you say that you didn't introduce him to anybody at all, to the legislators at all?

A. If I did, it was that night. I haven't anything to charge my memory with it, but I don't believe I did.

Q. Did you introduce him to Searles at all?

A. No, sir.

Q. Did you introduce him to Fishback?

A. No, sir.

Q. Did you introduce him to any senators at all?

[194]

A. No, sir; not that I know of, I don't believe I did.

Q. No member of the House? A. No, sir.

Q. You would say that you didn't introduce him to any member of the House? A. Yes, sir.

Witness excused. [195]

Testimony of J. Diamond, for Defendants.

Whereupon J. DIAMOND, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. METTLER.)

Q. What is your name? A. J. Diamond.

Q. Where do you, where do you live?

A. Placer Hotel.

Q. Are you acquainted with Mr. Galen, the man who was just on the stand? A. I know Mr. Galen.

Q. How long have you known him?

A. Eight years, I guess.

Q. You are the gentleman who had in charge the furs at the Placer Hotel? A Yes, sir.

Q. I will ask you if you remember an occasion in the Placer Hotel about the twenty-fifth of January last, when there was a sale, an auction sale in progress, of those furs, at which time the constable interfered with the sale? Do you remember that time? A Yes, sir.

Q. Did you see Mr. Galen at that time?

A. Why, yes.

Q. Now, will you just tell the Court,—just tell the Judge what happened there, as you remember it?

A. There was a gentleman come up and gave Mr. Galen a paper, and that is really all I seen. I asked Mr. Galen to look after my business. He said he didn't have any time because he is busy. That is all I seen.

Q. At the time that you first spoke to Mr. Galen,

(Testimony of J. Diamond.)

or he first spoke to you, where were you in the Placer, in the lobby? [196]

A. Why, in the lobby next to the auctioneer.

Q. Now, did you see where Mr. Galen came from before you spoke to him. Where was he standing?

A. He was in the back end of the lobby, and there was a man got up out of a seat—

Q. Wait a minute. Before this occurred, did you see Mr. Galen at the time that the constable interfered. Where was he. Do you know?

A. The constable was sitting down, if he was a constable.

Q. The man that interfered with your sale?

A. Oh, the man that interfered with my sale?

Q. The man that stopped your auctioneer from selling; at the time that the auction was stopped, where was Mr. Galen, do you know?

A. The back end of the lobby, I think.

Q. Whereabouts, with reference to the office desk, or did you see him?

A. Back end of the lobby, I guess.

Q. Did you see Mr. Galen. Did you call Mr. Galen? A. Yes, sir.

Q. And where was he at the time that you called him to come to you?

A. I really cannot recollect.

Q. You don't remember that part?

A. No, sir.

Q. But he came to you, and then what did you do, or where were you standing when you were talking to him about taking this case for you?

(Testimony of J. Diamond.)

A. Why, as close to the table, as close as I can tell you where I had the auctioneer at.

Q. What were you doing at this table? [197]

A. Why, talking to the auctioneer at the time when they arrested my auctioneer.

Q. Now, at what time was it that this man you say handed a paper to Mr. Galen?

A. Between eight thirty and nine o'clock.

Q. Was it before or after you were talking about having Mr. Galen defend you in court the next morning. Did the man hand the paper to him before you talked, or after you talked about that?

A. I believe it was about the same time.

Q. Where was this man at the time you handed the paper to Mr. Galen?

A. Why, he was in the back of the lobby.

Q. Back of this table? A. Yes, sir.

Q. Was he standing or sitting?

A. Well, I am not sure, I kind of think he was sitting, and he just gave Mr. Galen the paper. I only noticed the paper. I couldn't tell the man's name, if I see him.

Q. You don't know who the man was?

A. No, sir.

(No cross examination.)

Witness excused. [198]

Testimony of J. A. McDonough, for Defendants.

Whereupon J. A. McDONOUGH, a witness called and sworn on behalf of the defendants, testified as follows:

(Testimony of J. A. McDonough.)

Direct Examination.

(By Mr. METTLER.)

Q. Your name is J. A. McDonough?

A. Yes, sir.

Q. You are an attorney at law residing at Great Falls, Mr. McDonough? A. Yes, sir.

Q. And you are one of the attorneys in the case of the United States against Alderson, Rae and others. Your name has been mentioned here?

A. Yes, I sat in the case in behalf of Mr. Speer.

Q. You were present during the entire trial, were you?

A. I was not here the first day. I came later, Monday night and started to sit in the case Tuesday morning.

Q. I will ask you if you were present on the last—on the Friday upon which the arguments were completed in that case? A. Yes, sir.

Q. Which would be the 26th of January?

A. Yes, I was here Friday.

Q. You heard Mr. Galen's testimony, did you, with reference to the arrangement of the tables, at which counsel and defendants were sitting, and the respective positions of those persons. A. Yes, I did.

Q. What have you to say as to whether that is substantially correct?

A. According to my best recollection, it is correct.

Q. I will ask you if you recall the recess of five minutes which occurred during the address of Mr. Wheeler to the jury? [199]

A. Yes, I recall his Honor granting a recess.

(Testimony of J. A. McDonough.)

Q. I will ask you if you recall the jury retiring from the courtroom?

A. Yes; the jury came around in front of the witness-stand, passing out between the tables which were stretched running lengthwise of the courtroom, and this west wall.

Q. And after passing out of the jury-box, where did they go, as you remember it?

A. It is my best recollection that they passed out of that west door, filed out that west door, because I was sitting at the end of the table.

Q. Now, you may state, where, if you know, that Mr. Galen was at the time that the jury filed out of the courtroom, as you have stated?

A. My best recollection, Mr. Galen was talking to Mr. Cowley in the aisle between the two tables. Mr. Galen sat behind Mr. Kelly, and Mr. Cowley had been seated behind Mr. Galen, so that there were three attorneys in a row there, and Mr. Rae sitting toward the front on the east side of the west table, and Mr. Alderson behind him, that rather blocked the aisle. Then Judge Calloway sat almost behind Mr. Cowley, then Joe Kaufman, another attorney for Mr. Speer sat a little behind, and to my left, as I was facing his Honor, and Mr. Speer sat behind me, so that there was rather a congestion of chairs in there at that time.

Q. What would you say as to the approximate space behind the two tables?

A. It was very narrow and difficult to move in and out because of a custom of some of the attorneys,

(Testimony of J. A. McDonough.)

we used to move the cuspidors so that they could use it; I had no occasion to use it myself. I know we did that as a matter [200] of courtesy. We used to take turns in doing that. It was pretty hard for me to put that cuspidor between the chairs; I know that. It was pretty hard to manipulate that cuspidor between the chairs.

Q. You may state whether you heard the testimony of the witness Kirshwing, who was on the stand yesterday?

A. Yes, I was in the courtroom when he testified.

Q. You may state whether you heard him testify that the juror Warner, on going out of the jury-box on the occasion of that five minutes recess whispered to Mr. Galen, at a point about where Mr. Wheeler, the district attorney is now sitting. Did you hear him testify to that?

A. I heard him testify yesterday; yes, sir.

Q. I will ask you to state, if you are able to state, whether that is true, or not?

A. I think we sat a little bit farther back than where Mr. Wheeler is now sitting, because I think the length of that table,—the table was swung around, so that it ran north and south the length of the courtroom, the north end of the table would have been further away from where Mr.,—from the jury than where Mr. Wheeler is sitting, that would make the aisle between the tables, where we were sitting, narrower than it is now.

Q. The question is, the question I was asking you is, are you able to state from your knowledge of the

(Testimony of J. A. McDonough.)

facts the conditions as they existed at the time of that five minutes recess, whether the witness Warner did whisper to Mr. Galen as he went out of the jury-box at that time?

A. I didn't see him whisper. I couldn't hear him whisper. Mr. Cowley and Mr. Galen were talking together, in the aisle, between the two tables; I was sitting at the end of the table, [201] because I was waiting for Mr. Kaufman and Mr. Speer to move out of my way, so that I could get back.

Q. Could you have seen the juror Warner whisper to Mr. Galen if he had done so, at that time?

A. Yes, because I was trying to study the faces of the jurors.

Q. Could the juror Warner have whispered to Mr. Galen from the point where you were without your seeing him. After the jury filed out of the box?

A. I don't see how it could be physically possible. I was worried over the case, nervous, highstrung all during the argument, and I was watching that jury intently all during Mr. Wheeler's argument, and even during the intermission, I was watching until they filed out of the room.

Q. Did the juror Warner whisper to Mr. Galen at that time during that five minutes recess at any time?

A. He didn't while I was in the courtroom.

Q. Did you ever see him do so at any time?

A. No.

Q. After the jury had filed out where was Mr. Galen sitting, when the jury were excused for the

(Testimony of J. A. McDonough.)

recess, in between the two tables?

A. He was sitting between the two tables with Mr. Kelly sitting to the south of him, and Mr. Cowley, assuming that the direction of his Honor is to the south, Mr. Crowley sat north of him.

Q. Now, then, as the jury were filing out, where was Mr. Galen sitting, in the same place?

A. Still between the two tables.

Q. After the jurors had filed out, and gone out in the corridor, where was Mr. Galen?

A. I moved back. [202]

Q. How?

A. I moved back to speak to Miss Cort.

Q. I mean after that?

A. I moved back out of the way, Mr. Galen came up between the aisles of the chairs, between the two tables.

Q. At the time that he came out between the two tables, did you see the juror Warner anywhere?

A. The juror must have gone out in the hall. I didn't see them in here.

Cross-examination.

(By Mr. WHEELER.)

Q. You say, Mr. McDonough, that you were worried over the case and nervous?

A. I worried all during the trial of that case, because of my interest in behalf of the defendant Mr. Speer.

Q. And you say you were worrying on the 25th day, the day that I made my closing argument, that you were worried over the case at that time?

(Testimony of J. A. McDonough.)

A. A case of that kind is always a strain on my mind if I am an attorney in it.

Q. You say that you were worrying on that occasion? A. Yes, sir.

Q. You know Mrs. Sidebotham here?

A. Yes, sir.

Q. You remember having had a conversation with her on that day? A. Yes, sir.

Q. Isn't it a fact that you went over to Mrs. Sidebotham and said to her, on the 25th of January, "Mrs. Sidebotham, don't worry; the jury is fixed," or "is safe"? A. Absolutely false.

Q. You would say that you didn't make any such statement as that at all?

A. I said to Mrs. Sidebotham and Miss Cort, I said, "Be of good cheer." She had been crying around the courtroom, and [203] bothering me; the tears were in her eyes,—her eyes were tear-stained. I felt sorry for the little lady, and felt sorry for her sister, and would tell her to be of good cheer.

Q. Didn't you say to her on that occasion, "Don't worry at all; the jury is fixed," or "the jury is safe"?

A. Absolutely false. I never told her anything about the jury being fixed or the jury being safe.

Q. Well, you were getting reports from the jury, were you not?

A. I never received a report from this jury until the jury walked into the courtroom, and rendered the verdict to his Honor.

(Testimony of J. A. McDonough.)

Q. Would you say you didn't get any report from the jury at any time during the trial of the case?

A. Never received a report. I knew no jurors.

Q. Now, tell me, Mr. McDonough, what occurred here,—who was talking with Mr. Kelly during that five-minute intermission?

A. Why, I didn't keep watch of each man during the entire five minute intermission, Mr. Wheeler.

Q. But you did keep particular watch of Mr. Galen during that five minute intermission?

A. No, sir, I did not.

Q. Do you remember the juror Warner coming back into the room prior to the time that the jurors got in their seats?

A. There was one occasion that Mr. Warner,—Mr. Warner often came back and sat in the chairs. He had been apparently moving around like he was sick. I think that was the afternoon he came in and sat in the chair, another time during the trial of the case.

Q. I am asking you about this particular afternoon.

A. There was a cushion or coat under one of the jurors.

Q. You remember Mr. Houston coming up to me here just before [204] Mr. Galen came back into the room?

A. I remember Mr. Houston coming in and leaning over your shoulder.

Q. And I was standing only a few feet from you at that time?

(Testimony of J. A. McDonough.)

A. You were close on this west side of the room; I was a little to the north of the table, of the end of the table.

Q. Did you hear Mr. Houston tell me at that time that Mr. Galen was out there with his arm around one of the jurors?

A. I couldn't hear what he said. I didn't want to hear. I knew he was in the employ of the Government, and undoubtedly assisting you in the prosecution.

Q. How did you happen to notice Mr. Galen and Mr. Cowley standing in the middle of the aisle?

A. This situation was so congested because of Mr. Kaufman and Mr. Speer sitting behind me; the table ran out pretty well to the north, running north and south; there was not very much room for us to get out of the way, to move back. We always had to elbow or manipulate our way out between the chairs.

Witness excused. [205]

Testimony of A. M. Alderson, for Defendants.

Whereupon A. M. ALDERSON, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. METTLER.)

Q. Mr. Alderson, you were one of the defendants in the case of the United States vs. Alderson and others that has been referred to here?

A. Yes, I was.

Q. I will call your attention to the afternoon of

(Testimony of A. M. Alderson.)

Friday upon which the arguments to the jury were concluded, being the 26th day of last January, and Particularly to the five minute recess that was directed by the Court during the address of the district attorney, and ask you if you remember that?

A. Yes, I have a recollection of such a recess.

Q. I will ask if you heard the testimony of Mr. Galen in which he described the arrangement of the tables, and the position of respective counsel, and of respective defendants at and about those tables.

A. I heard that testimony.

Q. I will ask you if that is substantially correct.

A. I think it is.

Q. I will ask you also if you heard the testimony of Joseph Kirshwing who was on the stand yesterday? A. I did.

Q. Where were you at the time that the jury left the jury-box?

A. Sitting beside Mr. Galen, or standing beside him in the aisle.

Q. When you say the aisle, you mean the space between the two tables that have been referred to here?

A. I think it might be designated as the aisle between the two tables. [206]

Q. Where was Mr. Galen at the time that the recess was directed by the Court?

A. At the time his Honor declared a recess Mr. Galen was standing besides me between the tables.

Q. And where was he at the time the jury filed out of the jury-box?

A. My opinion is that he was still standing or sit-

(Testimony of A. M. Alderson.)

ting in the same relative position at the time Court declared the recess.

Q. Where was he after the jury had left the courtroom,—where was he sitting?

A. Why, we moved around, got out from between the tables, and started to smoke.

Q. Now, were you in a position that you could have seen the witness Warner if he had whispered to Mr. Galen, as the witness Kirshwing testified he did whisper at the time the recess was declared?

A. Why, I believe I would have seen him, yes, had such a thing happened, Mr. Wheeler, I would have seen it.

Q. Did any such thing happen?

A. I don't believe it did.

By Mr. WHEELER.—It is not a question of belief; it is a question of whether or not you say it.

By the COURT.—He said he didn't see it. He thinks he would have seen it if it had happened.

Cross-examination.

(By Mr. WHEELER.)

Q. Mr. Alderson, you are acquainted with some of the jurors?

A. Well, I know some of them,—none of them intimately; I know some of them undoubtedly.

Q. You had a jury list, did you not, Mr. Alderson?

A. No, sir; I did not. [207]

Q. You had no jury list at all?

A. I had a partial list of the jury.

Q. Where did you get that?

(Testimony of A. M. Alderson.)

A. I got it by nosing around, to find out who had been served.

Q. By nosing around?

A. Yes; to find out who had been served upon the grand jury, I mean upon the petit jury.

By Mr. METTLER.—I think I shall object to that as improper cross-examination. I don't see what it has to do about this particular matter, that was inquired about by counsel.

By the COURT.—Well, it is. I think probably the Court would *probably inquired* into it anyhow.

By Mr. METTLER.—I have no objection to the Court inquiring of its own motion.

Q. Mr. Alderson, how many names did you have upon that list?

A. I don't know, Mr. Wheeler, how many I had. I would say that I possibly had a dozen.

Q. And you furnished Judge Smith with a list, did you?

A. I didn't know Judge Smith had the list at the time I went to him, which was on Sunday.

Q. You had a list,—he had a list at that time, on Sunday? A. I think he had.

Q. A complete list at that time?

A. I don't know whether it was complete or not; he had a list.

Q. As a matter of fact, had the list before Monday?

A. I think he had a list; I don't know whether it was a complete jury list or not; he had what pur-

(Testimony of A. M. Alderson.)

ported to be a list of men that were going to serve on the jury some time Sunday.

Q. What names did you nose around and get upon that, [208] making a dozen?

By the COURT.—Oh, I don't know that that is material. The Court itself simply desired to know whether they did have it. He has answered what relation he had with it. Proceed.

Witness excused. [209]

Testimony of W. C. Rae, for Defendants.

Whereupon W. C. RAE, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. METTLER.)

Q. Your name is W. C. Rae? A. Yes, sir.

Q. You were one of the defendants in the case of the United States v. Alderson and others that has been referred to here? A. Yes, sir.

Q. You were present during the trial of that case?

A. I was, sir.

Q. I will call your attention, Mr. Rae, particularly to the afternoon of Friday, the 26th day of last January, and to the five minute recess that was directed by the Court during the address of Mr. Wheeler to the jury. Do you remember that five minute recess?

A. Yes, I do.

Q. You heard Mr. Galen's testimony detailing the arrangement of the tables, and the seating of counsel, and defendants, at those tables, did you?

(Testimony of W. C. Rae.)

A. Yes, sir.

Q. And that is substantially correct?

A. Yes, I think it is.

Q. Now, you also heard the testimony of the witness Kirshwing given here yesterday, in which he stated that the juror Warner, as the jury passed out, whispered to Mr. Galen. I will ask you where you were with reference to Mr. Galen at the time that the recess was directed by the court?

A. I was sitting at the right of the table, that is, the far corner of the table, the corner of the west table, directly behind me was Mr. Alderson; directly behind Mr. Alderson was Judge Calloway; on the opposite side, to my left, was Mr. Kelly; [210] directly behind Mr. Kelly was Mr. Galen, directly behind Mr. Galen was Mr. Cowley. At the far end there was quite a few of the defendants, and the attorneys in there. I don't know the relative positions in which they sat.

Q. What was the condition of the space, narrow aisle, as it has been called, between those two parallel tables at the time that this recess was ordered by the Court?

A. It was practically impossible for anyone sitting behind Mr. Kelly or myself to get out of there without us getting up and making room for him to get out. That is, to come around this way (indicating). At the other end of the table, there would have to be quite a crowd of *them* get out of the way to let him back out of that position.

(Testimony of W. C. Rae.)

Q. I will ask you what your position was with reference to Mr. Galen at the time this recess was ordered by the Court, as to whether you could have seen the juror Warner whisper to Mr. Galen, if he had done so?

A. Why, it would have been impossible practically for the juror Warner to have whispered to Mr. Galen in the position in which we were at the table. The only way that Mr. Warner could have whispered to him was to lean clean over the table from this side, and over my shoulder, or Mr. Alderson's shoulder to whisper to Mr. Galen.

Q. I will ask you whether the juror Warner did at that time whisper to Mr. Galen?

A. Not to my knowledge.

Q. And would you have known it had he done so?

A. I think I would.

By Mr. EVANS.—May I ask a few questions?

By the COURT.—Yes.

(By Mr. EVANS.)

Q. Mr. Rae, you recall the night, the Friday or Saturday the night of Friday or morning of Saturday after the case had [211] gone to the jury?

A. Very well, Mr. Evans.

Q. Did you at any time that night walk around the outside of the courthouse here, or in that vicinity?

A. There was very little of the time that I didn't walk around town that night. I walked up all around town, in fact, I didn't do anything else but walk around town. I was nervous—

Q. What was the matter?

(Testimony of W. C. Rae.)

A. I was nervous, and very naturally would be, and very anxious to know whether the jury had rendered a verdict, whether they had got a verdict, I wanted to know whether they had reached a verdict and gone to bed, or not.

Q. Just tell briefly, if you can, when you came up around in this vicinity at all, and who was with you. State what you did, and what occasioned your coming at all.

A. Why, I was standing in the lobby of the Placer Hotel along about eleven o'clock,—I think possibly 10:30. Mr. Flynn, the Deputy United States Marshal, came into the hotel, and I walked up to him, and asked him if he had heard whether the jury had gone to bed, or whether they had returned a verdict or not. Mr. Flynn told me that he didn't know. I asked him if there was any way that he could find out whether or not the jury had retired for the evening, or had returned a verdict under the instructions of his Honor, and dispersed. Mr. Flynn said that the United States Marshal, Mr. Ashbridge, was going to remain in the marshal's office until the jury had retired for the evening, and that he would go to the telephone and call Mr. Ashbridge up to see if that was the fact, if they had retired for the evening. He went over to the telephone and presumably telephoned, and he came back to me and said that they had undoubtedly gone to bed at the county courthouse because he couldn't get Mr. Ashbridge on the phone. I walked around the lobby a while longer, and I walked [212] out of the hotel. I

(Testimony of W. C. Rae.)

don't know what street it is over there—

Q. Edwards Street?

A. Edwards Street, and came down this street here, and then up this street on the opposite side from the Federal Building, when I got on this side, there was a light in the upper story up here (indicating) and the only light that there was in the building at that time, so I took it for granted that that was the jury-room, and the jury were still deliberating on their verdict. I went back to the Placer Hotel.

Q. Were you alone at that time?

A. I was alone at that time; yes, sir. I went back to the Placer Hotel, and seen Mr. Kelly and Mr. Lamb at the Placer Hotel. We talked there for a quite a little while, and I informed them that I thought that jury was still deliberating yet over their verdict, and that they had not retired for the evening. So a short time after that, the three of us took a walk around town, and we walked up this way, we walked up here, and the light was still burning, we then walked back downtown,—that was about twelve o'clock,—we went to the Eddy Cafe and had a lunch, and came out from there, I presume, perhaps 1:30. Went up around the Placer Hotel again, and shortly after that we came back, we walked up here, and then walked back to the hotel. I made one trip alone after that, and then home about half-past three or four o'clock. The light was still in this window up here. We couldn't see any of the jurors, and they, I presume, could not see us

(Testimony of W. C. Rae.)

where they were sitting down. You could judge from the place,—you could see the back of their heads once in a while a fellow would get up, and we could see that they were still there. There was not anybody making any signs; we just simply walked up there and walked back.

Q. Do you recall any of the stops, when Mr. Kelly and Mr. Lamb were with you, do you know whether you stopped on this corner of Park Avenue, and talked? [213] A. Yes, sir.

Q. Was there any newspaper waving, or anything of that kind?

A. No, sir; no newspaper waving there. Mr. Lamb was talking a great deal with his hands.

Q. He had had a drink or two?

A. I think he had several; in fact, that was the reason we were walking around with Mr. Lamb around town a great deal.

Cross-examination.

(By Mr. WHEELER.)

Q. When you first came up there, Mr. Rae, you came up alone, you say?

A. Yes, sir, I came alone.

Q. Then subsequently you came up with Mr. Kelly and Mr. Lamb? A. Yes, sir.

Q. Which one of you stopped over to the steps of the building right across here?

A. I don't remember of us ever separating on any of those trips.

Q. You and Mr. Kelly, didn't you separate when

(Testimony of W. C. Rae.)

you got down here across this street, Park Avenue?

A. No, sir, we walked down the street here to the other side of the Bonneville, then we came back here, I think I went down this street, down this way, I thought I would be going home, and they thought I was going home, in fact, I told them I was going home. I wasn't doing myself any good walking around worrying about this. I think Mr. Kelly and Mr. Lamb went around the other way, I met them, and I changed my mind, and went back to the Placer Hotel.

Q. What time were you in the Eddy Cafe?

A. About twelve o'clock; I think it was about 12 o'clock, as near as I can remember.

Q. Were you back over to the Eddy Cafe at all?
[214]

A. Not after that, no.

Q. Now, Mr. Rae, do you recall just exactly how that jury went out during that five minute recess?

A. No, sir, I don't recall just how they went out, Mr. Wheeler.

Q. Let me ask you if it isn't a fact, Mr. Rae, do you recall about the Court granting a recess earlier in the afternoon, do you recall that? At the suggestion of Mr. Warner.

A. Yes, sir, at the suggestion of Mr. Warner. Yes, I remember that.

Q. And then another recess was granted during the time that I was making my closing argument, and you recall Warner remaining in his chair for a few moments?

(Testimony of W. C. Rae.)

A. No, sir, I don't recall that.

Q. You don't recall that?

A. No, I don't recall that; I don't remember of seeing Mr. Warner.

Q. Would you say that Warner passed out when the other jurors passed out?

A. No, I wouldn't say that he did; I don't remember of seeing him in the chair at any time after the jury was excused, had been excused, but he was generally in here, one of the first ones to take his seat.

Q. As a matter of fact, he was one of the last ones that usually went out, and generally made some remark as he went out?

A. Yes, he generally remarked as much to yourself as to any of us, and to some of the attorneys, in passing his remarks.

Q. Generally lagged behind in going out?

A. I think so. I wouldn't say that he always lagged behind, no; there were some fellows in the back end of the jury-box.

Q. You don't want to give the Court the impression that you would [215] say that on that occasion Mr. Galen did not leave his chair and come down to the back part of the room before Mr. Warner got out of the courtroom?

A. Well, Mr. Galen sat there for some little time. We were standing up there before the crowd got to mixing around in there.

Q. Now, as a matter of fact, when the jury would go out, people that were sitting in the back part of

(Testimony of W. C. Rae.)

the room, inside of the rail, would frequently block up the doorway, so that the jury had to wait around here before they could get out?

A. No, sir; I don't think so, Mr. Wheeler. The people that were at the back end of the table generally went over there, we were the defendants, and would go over to the other side of the building, I don't think they blocked particularly this door, I don't remember that they did. I don't recall that they ever did. I wouldn't say that they did not.

Q. You don't know whether or not Mr. Galen had a conversation or spoke a word or two to Mr. Warner before he went—or before Mr. Warner left the courtroom on that day, do you?

A. No, sir; I never seen him, if he did.

Q. He might have done so?

A. If he did it I would have undoubtedly noticed that.

Q. You would have noticed it, standing up here?

A. Yes, sir, in the aisle there.

Q. But if the conversation, or the presumed conversation, or the remarks had taken place down to the end of the table, the chances are that you would not have seen it, is that correct? A. Yes, sir.

Witness excused. [216]

Testimony of Antone Himmelbauer, for Defendants.

Whereupon ANTONE HIMMELBAUER, a witness called and sworn on behalf of the defendants, testified as follows:

(Testimony of Antone Himmelbauer.)

Direct Examination

(By Mr. METTLER.)

Q. Your name is Antone Himmelbauer?

A. Yes, sir.

Q. You reside in Helena? A. Yes, sir.

Q. How long have you resided here, Mr. Himmelbauer? A. I came to Helena in 1883.

Q. What is your business?

A. I am a stockman.

Q. You have a large stock interest in this county, have you? A. Yes, I am running cattle.

Q. You are a resident of Helena at the present time? A. In the winter I stop in Helena.

Q. And your ranch is where?

A. Is up in the Blackfoot, this side of Fleisher.

Q. You are acquainted with Mr. Galen, are you?

A. Yes, sir.

Q. How long have you known him?

A. About twenty years.

Q. You are on friendly relations with him, are you? A. Yes, sir.

Q. You live up a neighbor to him?

A. Close by.

Q. And have resided here for some period of time? A. Yes, sir.

Q. I will ask you if you were a spectator, if you were in attendance in the courtroom here at any time during the trial of the United States against Alderson and Rae in which Mr. Galen [217] was one of the attorneys.

A. I was here from the second day on during all.

(Testimony of Antone Himmelbauer.)
the meetings of the court.

Q. For the entire time? A. Yes, sir.

Q. I will ask you if you were present on Friday, the 26th day of January, which would be the day the closing arguments were made to the jury, and the judge charged the jury. You were present on that date?

A. I don't know what date it was, but I heard Mr. Wheeler speak in the closing argument.

Q. You heard Mr. Wheeler's address?

A. Yes, sir.

Q. Mr. Himmelbauer, I will ask you if you remember the five minute recess that the Court ordered during Mr. Wheeler's address to the jury.

A. Yes, I do.

Q. Where were you at the time that that recess was declared?

A. I was sitting back there just where Holly Herin is, he is sitting in the second row.

Q. And you were sitting in the second row of seats back of the railing? A. Yes, sir.

Q. Did you see the jury when they left the jury-box at that time? A. I did.

Q. Did you hear the testimony, were you here yesterday, Mr. Himmelbauer?

A. I was here yesterday for half an hour—I was on the ranch, and I came into the courtroom here it was about a quarter to four [218] and I was here about fifteen minutes, and I walked out again.

Q. I will ask you, Mr. Himmelbauer, if you heard Mr. Galen's testimony this morning when he was on

(Testimony of Antone Himmelbauer.)

the stand with regard to the arrangement of these tables here.

A. Well, I came in, it was about, I think it was about twenty-five minutes to eleven, when Mr. Galen was on the stand, when I came in here, but I don't know how long he was on the stand before.

Q. Did you hear Mr. Galen testify here about the arrangement of these two tables, how they stood—

. By Mr. WHEELER.—We will admit the arrangement of the tables.

A. I know how the tables stood during the time exactly, during the trial.

Q. You remember that? A. Yes, sir, exactly.

Q. What I want to ask you is this. Were you in such a position at the time of the five minute recess on the Friday that Mr. Wheeler was making his closing address to the jury, that you could observe whether the juror Warner whispered to Mr. Galen as he went out? Were you in a position where you could have seen that?

A. Why, exactly, because the way I was sitting here, and the courtroom was kind of crowded. I saw the jury walking out slowly, I think there was some crowd here at the door, that is what I seen.

Q. Now, I will ask you if on that occasion you did see the juror Warner stop and whisper to Mr. Galen on his way out.

A. As far as my recollection is concerned Albert Galen stood there where he was, and the jury was slowly going out this way, and McDonough was sit-

(Testimony of Antone Himmelbauer.)

ting over here, and Galen was standing on the left side back of McDonough.

Q. In this aisle where the two tables— [219]

A. In this aisle, yes, sir.

Q. If the juror had spoken to Mr. Galen could you have seen it? A. Absolutely.

Q. Did you see any juror speak to Mr. Galen at that time? A. I did not.

Cross-examination.

(By Mr. WHEELER.)

Q. You say you are a neighbor of Mr. Galen?

A. Living about half a block from him.

Q. And you were here during the trial of the case every day? A. Yes, sir.

Q. Let me ask you if you noticed each juror that went out that day.

A. I could not because the jurors, I only knew two of the jurors.

Q. Which ones did you know?

A. I knew Brown because I was on his ranch trying to buy cattle, and I knew Warner from seeing him on the Street. I never talked to the man in my life.

Q. You know Brown and Warner?

A. And Sweeney.

Q. When did you first become acquainted with Warner? A. I never spoke to the man in my life.

Q. When did Warner go out with reference to the others on the jury? A. I cannot tell you.

Q. Would you say that Warner went out with the

(Testimony of Antone Himmelbauer.)

rest of the jurors or after the rest of the jurors?

A. I see them all filing out, and there was a little congestion here at the door, and they were standing up and walking out.

Q. When these jurors went out, there was some congestion at the door, was there not? [220]

A. Yes, sir.

Q. I will ask you if it is not a fact that the juror Warner stayed here, and stood up around the desk for a while, a few minutes, and was the last man out of the room?

A. I couldn't say.

Q. As a matter of fact, you wouldn't say?

A. No, sir.

Q. As a matter of fact, you didn't particularly observe Warner on that occasion?

A. No, but I noticed Galen especially, because I was interested.

Q. It might have been possible—

A. I was interested in Alderson and Rae, and I was interested in the whole case.

Q. What was your interest in Alderson and Rae?

A. Why, I had my private opinion formed that those fellows were not guilty.

Q. Yes, you had your private opinion that those men were not guilty?

A. Yes, sir.

Q. You had known Brown for some time?

A. From buying from cattle. I went on his ranch. He sent word that he had some cattle up there.

Q. Did you talk with Brown when he was in Helena here?

A. No, afterwards.

(Testimony of Antone Himmelbauer.)

Q. Didn't you talk to Brown?

A. Let me see. Let me finish my story so that I can give the whole transaction. I was up on his ranch—Brown wasn't there—and his boy took me around the ranch and showed me the cattle. He asked me, "Are you going to buy the cattle, or not?" "Well," I said, "I will let you know." I looked at the cows—I knew they was Minnesota cows, that were shipped in there. I was up there [221] afterwards, about a month afterwards; I went up and bought a bunch of cows from a fellow name Christ Allen. I was driving the cow by Brown's place—

Q. When was all this?

A. It was in the month of October of this year.

Q. Of this year?

A. Yes, sir, and when Brown was here on the jury, I said—I saw Brown once in the Grand Central Hotel—I said, "I suppose you don't know me personally." I got a letter from Brown; he said why I didn't buy the cattle, and I told him the cattle were shipped in from Minnesota. He wrote me back in that letter that I didn't know what I was talking about.

Q. Did you talk to Brown when you were here in Helena?

A. I was just going to tell about that.

Q. Come to it.

A. I told him—I met him in the Grand Central Hotel—I said, "I am the fellow that was looking after them cattle. You got any more cows that was

(Testimony of Antone Himmelbauer.)

for sale?" That was all I spoke to him.

Q. When was that?

A. That was during the jury here.

Q. While he was sitting on the jury?

A. No, that was up in the Grand Central Hotel—the Eddy Hotel.

Q. I understand that, but I say it was while the case was on trial, you went up to Brown and asked him if he had any more cattle to sell? A. Yes, sir.

Q. You don't want to give us the impression, or give us to understand that it was not possible at all for Mr. Galen to have talked with Mr. Warner when he went out of the door?

A. It was possible—he—

Q. Did you see Mr. Warner go out of that door?

A. He shoved himself through there.

Q. Did you see Mr. Warner go out of that door?

[222]

A. I saw the whole jury filing out.

Q. In which order did they go out?

A. I couldn't tell you. As I told you before, I only knowed Brown and I knowed Warner and Sweeney.

Q. Did Warner go out before Brown, or after Brown? A. I couldn't tell you.

Q. Did you notice whether he went out before Sweeney went out, or after Sweeney went out?

A. I couldn't tell you.

Q. Do you know whether or not he remained in his chair a few minutes after the rest of the jurors went out? A. I don't remember that.

(Testimony of Antone Himmelbauer.)

Q. Do you know whether or not he stood here a few moments at the table before he went out—after he got out of his chair? A. I couldn't say.

Q. Do you know when he come into the room?

A. Well, I was out smoking—in the hall smoking—and when I came in the jury was all in.

Q. Do you know who Galen was talking to all the time?

A. I see Mr. Sidebotham was sitting on the left-hand side of Galen and Galen was over talking with Alderson and Rae.

Q. He was standing there and talking to Alderson and Rae? A. Yes, he was standing up.

Q. And you kept your eyes continually on Mr. Galen?

A. I didn't keep my eyes, I had no occasion to watch Mr. Galen particularly; I saw him right there, standing there right in the middle of the room.

Q. You were here also when the first recess took place in the afternoon, were you not?

A. (No response.) [223]

Q. There were two recesses that afternoon, were there not?

A. I don't remember that; I think there was one about three o'clock.

Q. Can you tell us what Mr. Galen did at any time when there was a recess, or who he talked to?

A. No, sir; I didn't pay any attention.

Q. You didn't pay any attention to it, did you?

A. No, sir; I just paid attention to the case, is all.

Q. What was it that called your particular atten-

(Testimony of Antone Himmelbauer.)

tion on this date, and during this five minute recess?

A. Well, because I naturally was interested in the transactions of the court, in the proceedings of the trial.

Q. Was there any reason why you should particularly watch Mr. Galen on that particular day, and during that particular recess?

A. Well, because Galen was sitting there; I remember just exactly, Mr. McDonough was sitting there; I remember the jury going out slowly out of the courtroom.

Q. But you don't know when Mr. Warner went out? A. I do not.

Witness excused. [224]

Testimony of Charles Reibold, for Defendants.

Whereupon CHARLES REIBOLD, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. METTLER.)

Q. Mr. Reibold, what are your initials?

A. C.

Q. Charles? A. Charles.

Q. You reside in Helena? A. Yes, sir.

Q. How long have you resided here.

A. About thirty-five years.

Q. What is your business? A. Groceries.

Q. How long have you been engaged in that business?

A. Well, twenty-four years, of that time,—well,

(Testimony of Charles Reibold.)

more than that,—twenty-five to twenty-six years.

Q. You were one of the jurors impanelled and sworn in the case of the United States vs. Alderson and Rae and others, and that has been referred to here, were you? A. Yes, sir.

Q. Are you acquainted with Mr. Galen?

A. Yes, sir.

Q. How long have you known him?

A. Well, I have known him ever since he was a small boy,—that is, known of him, not intimately acquainted with him.

Q. He grew up here in Helena, and was raised here in Helena?

A. Yes, I knew him when he lived up on Rodney Street.

Q. You knew him during that time?

A. Yes, sir.

Q. You are familiar, Mr. Reibold, having been a juror in the case [225] with the arrangement of the two tables?

A. Yes, in the jury-room.

Q. That were used by counsel in the case?

A. Yes, these tables here, oh, yes.

Q. These tables here?

A. Yes, I believe I am.

Q. Do you recall that the arrangement was quite different from what it is at the present time?

A. Yes, sir.

Q. You were also familiar, Mr. Reibold, with the position of the attorneys in that small aisle between the two tables? A. Yes, sir.

(Testimony of Charles Reibold.)

Q. Which seat in the jury-box, Mr. Reibold, did you occupy, the rear row of seats? A. Yes, sir.

Q. You are familiar, and have in mind, Mr. Reibold, I take it, the relative position of the attorneys in this small aisle between the two tables?

A. Yes, I think I could describe them.

Q. And you remember about what part of that aisle was occupied by Mr. Galen, do you not?

A. Practically, yes, sir.

Q. Now, I will call your attention, Mr. Reibold, to the Friday, the 26th day of January, the afternoon *that* that day, to a recess of about five minutes that was ordered by the Court during the address of Mr. Wheller to the jury. Do you recall the incident of that five minute recess being declared?

A. Oh, I remember having a short recess, not particularly about it, but I remember it.

Q. Do you remember the incident of the recess?

A. Yes, sir.

Q. Now, I want to ask you if you recall the position of the [226] attorneys, and particularly of Mr. Galen, at the time of the ordering of that recess, between those two tables where he was at the time that the recess was ordered by the Court?

A. Well, I would say that he was sitting right back of Mr. Kelly and Mr. Alderson, or the gentleman that sat next to Kelly,—I call him Alderson; is that Alderson?

Q. Rae. A. You see, I got those two men mixed.

Q. As the jury passed out, Mr. Reibold, I will ask

(Testimony of Charles Reibold.)

you to state where they went, what part of the courtroom they passed through with reference to those two parallel tables?

A. Well, I can only say for myself, I came right out through this way (illustrating).

Q. Whenever a recess was taken, it was the custom of the entire jury to pass out through this west door of the courtroom, was it not, into the corridor?

A. Yes, it was the way.

Q. Now, from your knowledge of the position of the two tables, and of the position of Mr. Galen between them, and of the route which would be taken by the jury in passing out, what have you to say as to whether it would be possible for one of the jurors to whisper to Mr. Galen, without either Mr. Kelly, Mr. Alderson, Mr. Rae, or some of the other persons in that aisle observing the fact that he did whisper to him?

By Mr. WHEELER.—That is objected to as calling for a conclusion of the witness, an opinion of the witness upon a matter which is common knowledge.

By the COURT.—Objection sustained.

By Mr. METTLER.—Note our exception.

Q. In order for the juror to whisper to Mr. Galen in that position, [227] you may state what it would be necessary for him to do?

By Mr. WHEELER.—Object to that as calling for an opinion, and conclusion of the witness.

By the COURT.—Objection sustained.

By Mr. METTLER.—Note our exception.

Q. I will ask you if at any time, at the time the

(Testimony of Charles Reibold.)

recess was ordered, or shortly after that, you observed the witness Warner whispering to Mr. Galen?

A. No, sir, I couldn't say that I did.

Q. Are you acquainted with Mr. Wheeler?

A. Only during that trial, is the only time I met Mr. Wheeler, during the trial here.

Q. Were you ever called to Mr. Wheeler's office for any purpose? A. Yes, several days ago.

Q. Since the trial was over? A. Yes, sir.

Q. You may state under what circumstances you were—

A. Do you want me to state under what circumstances?

Q. Yes, sir.

A. Mr. Wheeler sent somebody down to ask me to come to his office, and I came up. You want me to state what conversation occurred.

Q. Yes, sir. Just exactly what occurred.

A. Mr. Wheeler accused me of allowing somebody to approach me during the time of the trial. I denied it. He said that Jake Fish, the pawnbroker, had been in my store and bought a dollar's worth of sugar and talked to me about the Alderson and Rae case. At the time I was doing up sugar. I also denied that.

Q. Was there anything further that occurred? What did Wheeler say to you at that time when you denied what he stated there?

A. Well, he seemed to doubt it at first, and I told him that he could,—that I have been,—I had lived in Helena here for thirty-five [228] years, and

(Testimony of Charles Reibold.)

had been in business most of the time, and he could go among the business men of Helena and see if I would be likely to do anything of that kind. He said he had done that; he said he had inquired; he said he was satisfied he could depend on me, and the answer that I would give him, and for that reason he sent for me.

Cross-examination.

(By Mr. WHEELER.)

Q. I ask you, didn't I, that is, I asked you if one Jake Fish, a pawnbroker of this city, had not come up to your place of business?

A. You said that he had been up there.

Q. Yes, I told him that he had been up there, that he had been up there and purchased a dollar's worth of goods of some kind?

A. I asked you at the time if you knew, and you said somebody had told you.

Q. I told you that somebody had given me the information that Mr. Jake Fish had been up to your place of business, and purchased a dollar's worth of goods from you, and had spoken to you, or told you that Mr. Alderson and Mr. Rae, or both of them, were good fellows, and to be easy on them?

A. I don't know that you said that. You said that he talked to me about the Alderson and Rae case.

Q. Well, that was the substance of it?

A. You said that he had talked to me about the Alderson and Rae case.

Q. Well, Jake Fish was up at your place of business, was he not?

(Testimony of Charles Reibold.)

A. Not during the time of the trial.

Q. When was the last time that Jake Fish was up there?

A. Since the trial; just a day or two ago.

Q. When was he up there prior to that time?

A. I couldn't say; a month or six months, might have been. [229]

Q. You and Jake Fish have been friends for some little time?

A. Simply in a business way; I buy ice from the Ice Company; that is as far as our friendship goes.

Q. You buy ice from the Ice Company in which Jake Fish is interested? A. Yes, sir.

Q. You have somewhat intimate acquaintance with Jake Fish for some time?

A. Simply a passing acquaintance.

Q. And would you say now that Jake Fish didn't come up to your store at any time at all?

A. During the trial?

Q. Yes. A. No, sir, he never did.

Q. Do you say that Mr. Fish didn't talk to you at all, or didn't say anything to you at all whatever about Mr. Alderson and Rae during that trial?

A. I do.

Whereupon the hearing was continued until 2 P. M. [230]

Thursday Afternoon, February 8th, 1917.

Testimony of Stephen Cowley, for Defendants.

Whereupon STEPHEN COWLEY, a witness called and sworn on behalf of the defendants, testified as follows:

(Testimony of Stephen Cowley.)

Direct Examination.

(By Mr. EVANS.)

Q. Your name? A. Stephen J. Cowley.

Q. Where do you reside? A. Great Falls.

Q. What is your profession?

A. I am an attorney at law.

Q. How long have you been living at Great Falls, Mr. Cowley? A. Six years and a half.

Q. How long have you been practicing at Great Falls? A. Six years and a half.

Q. In the State and Federal Courts?

A. In the Federal Court of Montana since the beginning of this trial.

Q. How long have you been practicing law altogether, Mr. Cowley, both in and out of Montana?

A. About sixteen years.

Q. You were one of the counsel for the defendant Speer in the case of the United States vs. Alderson and others? A. Yes, sir.

Q. And have been referred to all through this hearing? A. Yes, sir.

Q. You were present all through the trial?

A. I was.

Q. Did you hear Mr. Galen describe this morning, in his testimony, the way the attorneys' and defendants' tables were arranged, the stenographer's table, also in front of the jury-box, and his Honor's bench? [231] A. I did.

Q. What have you to say as to whether that is as you recall the respective positions of the different defendants? A. The description was correct.

(Testimony of Stephen Cowley.)

Q. Mr. Cowley, do you recall the recess that was had upon the day the arguments were closed, and the case submitted to the jury, the recess had during a break in Mr. Wheeler's argument?

A. In Mr. Wheeler's final argument?

Q. In Mr. Wheeler's final argument.

A. Yes, Friday afternoon, I recall it.

Q. Do you recall the recess being taken, and the jury excused for the recess? A. I do.

Q. Now, where were you seated then with reference to Mr. Galen?

A. At my usual place, immediately behind Mr. Galen.

Q. Where the other counsel that Mr. Galen described as sitting between these tables?

A. Those whom during the trial had sat in front of me, were in their accustomed places; those behind me I have no recollection of.

Q. Now, do you recall what Mr. Galen did when the recess was taken, the jury excused and started to leave their places in the box?

A. You mean the recess which occurred, the first recess in Mr. Wheeler's closing argument to the jury?

Q. Yes.

A. I did, if there were two recesses. I don't recall the second one. I left the courtroom immediately after the first one.

Q. What time of the day was the one that you do recall afternoon or forenoon?

A. Well, afternoon. I finished my argument

(Testimony of Stephen Cowley.)

shortly after two o'clock. Mr. Wheeler immediately began his argument without a recess, and after Wheeler had talked for perhaps three-quarters of [232] an hour to an hour, then a recess or intermission rather was taken by the Court.

Q. What did Galen do when the recess was taken?

A. That afternoon during Mr. Wheeler's argument, that is the recess you refer to?

Q. Yes.

A. Mr. Galen turned to me and congratulated me upon the argument that I had made to the jury, and he jollied me a little bit about that, and I was packing up my files in my file-case preparatory to leaving the courtroom, and while doing that Mr. Galen held a conversation with me. Then he asked me for a cigarette. I told him I didn't smoke cigarettes, but I solicited one from Judge Smith and got it and gave it to Mr. Galen, and then I left my seat and went over to the coat-rack, got my hat and coat and took my file and went to the hotel. I didn't return to the courtroom until nine o'clock that night.

Q. Mr. Galen stayed in his seat there for some subsequent period of time after the jury was excused?

A. I cannot say how long a time it was, but just long enough for to have transpired what I have related here. I left during the recess.

Q. Did you see Mr. Galen talking to Warner at all during that recess?

A. No, sir, I didn't see him talk to anybody.

Q. Whisper, or otherwise talk to him?

(Testimony of Stephen Cowley.)

A. No, sir.

Q. Did you observe the jury's movements?

A. I did not. I don't know whether the jury left their seats, or not.

Q. While Mr. Galen remained in his seat there. I have asked you about that. You say you didn't see Mr. Warner talk to him at all. [233]

A. I don't remember anything about that except what Mr. Galen said to me, and what I said to Mr. Galen, and then I left.

Q. Mr. Cowley, you were in the Placer Hotel the night of the 24th of January, were you not, at the bar at the time of the Kelly-Brown incident, or part of it?

A. Well, I am not sure as to the date. The case, as I remember, went to the jury Friday night.

Q. The 27th, was it not? A. Yes, sir.

Q. Or the 26th?

A. I think it was the night before that that incident at the Placer bar occurred.

Q. Were you present at the time when Mr. Wheeler and Mr. Kelly and Mr. Galen—

A. Oh, yes; I was present at the time of the incident in the Placer bar related by the contemnors, and as alleged by Mr. Wheeler.

Q. Mr. Cowley, tell just what occurred there at the bar, who were there when you went in, and what occurred in connection with this drink; just tell us briefly in your own way.

A. My recollection is that I reached the Placer Hotel about half-past ten o'clock that night, and in

(Testimony of Stephen Cowley.)

going from the main entrance to the desk I noticed my friend Mr. Wheeler and Mr. Galen standing in front of the bar leading into the bar, at the bar, and talked with them for a moment.

Q. And what did you say, what was done? Just go ahead and describe the incident?

A. I said, "Are you fellows soaking up heat here without spending any money?" and Dan Kelly then spoke up and said, "No; I am just buying a drink," and invited me to have a drink.

Q. You took a drink? [234]

A. I took a cigar.

Q. A cigar? A. Yes, sir.

Q. Who were there that you recall at the bar?

A. My recollection is that the only ones present at the particular end of the bar, that is, the extreme end opposite to the front door of the bar-room, was Mr. Galen and Mr. Wheeler. Now, I went right in between Mr. Kelly and Mr. Galen, as I recollect. My recollection also is that Mr. Brown and Mr. De Hart were on the other side of me. I was introduced to Mr. Brown. My recollection is that Mr. Brown was talking, or had taken a drink; he was wiping his moustache as he shook hands with me, and he said, "Good night," and went out. I turned to Mr. Wheeler and said, "Burt, aren't you drinking or smoking?" He said, "Yes, I will drink something now. I didn't want to take anything with that man." I said. "Why?" He said, "He is a juror." I said, "I didn't know; but what difference does it make, if jurors come in here and counsel on

(Testimony of Stephen Cowley.)

both sides are present? There is no reason why I should run out because they come in; they are allowed to run loose around town; we don't have to shun them. I don't see anything wrong in this." He said, "No; I made a practice not to drink with a juror, or to smoke," or something of that kind. I think that was in substance what occurred.

Q. Were there others in the bar-room *standing front* of the bar besides you?

A. Oh, the bar was filled that night, the same as it is every night. Some further conversation occurred between Mr. Wheeler and I that night with reference to this same matter, and along the lines as indicated, and ninety per cent or more, of the talking that I did was to Mr. Wheeler, and we finally left the bar-room,—he and I, anyway; I don't know whether Mr. Galen or Mr. Kelly followed or not, but we left discussing the matter, the incident. [235]

Q. Mr. Cowley, did you at any time during the trial see Mr. Galen talking to Mr. Warner, one of the jurors, do you recall?

A. Well, now, my recollection about that is not clear. I remember an incident occurring one afternoon at the trial. I was coming in to my seat, and the boys in front of me were laughing about something, and I inquired what it was, and they told me that Warner had just asked them which one of the defendants I was. But whether *had* had addressed that remark to Mr. Galen, or to Mr. Kelly, or to Alderson, or Rae, I don't know. That is the only time that I know of a conversation having been had

(Testimony of Stephen Cowley.)

between Warner and anyone connected with the defense.

Cross-examination.

(By Mr. WHEELER.)

Q. Mr. Cowley, coming down to the afternoon, to refresh your recollection, I will ask you if you don't recall of Mr.—after finishing your argument I will ask you if Mr. Warner didn't at that time ask the Court to take a little recess?

A. No, you mean just as soon as I finished?

Q. Yes.

A. No, what occurred was this: The Court, as I finished, said, "Proceed, Mr. Wheeler." You came to the table where I was standing up, picking up the manuscript from which I had argued the case, and you said a word of encouragement to me, and I did to you, and you went on, and I went back to my seat. That is my recollection of what occurred.

Q. There were two recesses that afternoon; you recall Mr. Warner having asked the Court for a recess prior to the time that I made my argument, or started to make my argument?

A. No, Mr. Wheeler, I don't. I know that Mr. Warner asked for recesses several times because of his disability. My recollection was that I was not interrupted during my argument in the afternoon. I was in the forenoon. [236]

Q. At the close of your argument, wasn't there a recess taken?

A. No, no; you succeeded me immediately without any intermission as I recollect.

(Testimony of Stephen Cowley.)

Q. If there were two recesses granted that afternoon, you would say that you left at the first recess?

A. I would say I was present at one, the only recess.

Q. And was that the recess do you recall that was taken while I was making my argument?

A. I think so.

Q. Were you present when I was making my argument, do you remember?

A. Yes, sir; I heard you, I think, for the first hour, or probably an hour.

Q. Now, coming down to the time when you—you don't yourself, do you, Mr. Cowley, whether or not as Mr. Warner went out of the room, whether or not he spoke to Mr. Galen, or not?

A. I only know that I never witnessed, that is—

Q. You didn't see it? A. No.

A. I say it might have occurred, and you might not have seen it, at all?

A. If it had occurred, I would have known about it. Understand, I wasn't here all during that recess, but it couldn't have occurred during the initiation of the recess until the time I left my place at the table without my knowing it because Mr. Galen turned around and began talking to me in the manner which I have heretofore indicated, and that continued until I gave him the cigarette, and picked up my filing case, and left the place.

Q. You left at that intermission, did you?

A. Yes, sir.

Q. Now, coming down to the time of the saloon

(Testimony of Stephen Cowley.)

down here at the Placer Bar. Let me ask you if it isn't a fact, Mr. Cowley, [237] Mr. Rankin, Mr. Galen and myself were standing up at the end of the bar, Mr. Kelly, and Mr. Brown were standing,—Mr. Brown was standing below Mr. Kelly when you came in? A. You ask me if that is not the fact?

Q. Yes.

A. I answer, no, to the best of my recollection it is not because I don't remember of ever having seen Mr. Rankin until he was a witness here yesterday morning. I have known the name for some time, and would have enjoyed meeting him, really looked for an opportunity, but never saw Rankin until in the courtroom this morning.

Q. Would you say that he was not standing there?

A. I would like to say that—

Q. I say, would you say that he wasn't there when you came in?

A. My answer is that I would like to say that I feel almost positive that he was not. Now, he may have been. There is the possibility, but not the probability, because I think the picture is clear in my mind of what occurred there that night.

Q. Now, Mr. Cowley, let me ask you if it is not a fact that Mr. De Hart was not standing there at all?

A. If he was not?

Q. Yes, sir; Mr. De Hart was not present in the saloon when you were there at all?

A. I will not state any more positively than I stated that Mr. Rankin was not there. I met De Hart every night, and would meet him every night

(Testimony of Stephen Cowley.)

in the Placer Hotel, and usually in that bar, and my recollection is that De Hart was there, though he may not have been, the same as Mr. Rankin may have been present. Don't understand me to be absolute in that though I would like to be.

Q. Why would you like to be?

A. It is an impression with me, that is why, and yet I would not [238] make an absolute statement.

Q. Now, the first time that you recall that De Hart, or the first thing that gave you the impression that De Hart was when Brown testified on the witness-stand? A. You are right.

Q. If you had been asked as to whether or not De Hart was there prior to the time that you heard Brown testify, you would have said that De Hart was not there, wouldn't you?

A. I wouldn't have felt quite so positive about it, though, as I have already stated, the facts are in my mind as outlined, and with reference to the two incidents I might be absolutely mistaken but I don't think I am.

Q. Now, Mr. Cowley, on the night that this took place, that was on the night of the 25th of January, wasn't it.

A. This occurred the night succeeding the day that Mr. Kelly had made his argument to the jury.

Q. How?

A. This occurred the night succeeding the day that Mr. Kelly had made his argument to the jury. That was Thursday night, if I remember right, because

(Testimony of Stephen Cowley.)

you and I argued the case Friday all day, and the case went to the jury Friday night.

Q. Did you see Mr. De Hart in the saloon the night before that?

A. The night before was Wednesday,—no, the night before, you and I were out to dinner together, and I wasn't in the bar-room that night.

Q. You recall my having called your attention to the fact that Brown was a juror, don't you?

A. Yes, you were the man that told me that Brown was a juror.

Q. And that was just about the time that Mr. Kelly introduced you to Brown?

A. Well, that was before I had a cigar even.
[239]

Q. That is what I said?

A. The bartender had not waited on us at all. As I was introduced to Brown he was wiping his moustache and shook hands, and said, "Good night." I turned to you, "Don't you smoke or drink?" Well, then you said, "I will take something now, but I didn't want to take a drink with that man because he was a juror."

Q. For the purpose of refreshing your memory, let me ask you this, Mr. Cowley. When you came in and came up to the bar, Mr. Galen and I were talking, and then Mr. Kelly had fifty cents up on the bar, did he not, fifty cents or a dollar or a piece of change, do you recall that?

A. Yes, it was a dollar.

(Testimony of Stephen Cowley.)

Q. At that time, Mr. Brown,—I would say he took the drink after you came in?

A. I wouldn't say that; I think not.

Q. You would say not?

A. No, no, don't misunderstand me. I don't say not; I think not; my recollection is that he had his drink and was wiping his moustache after having had it, and then immediately went out.

Q. But, Mr. Cowley, when you came in there, Mr. Kelly had the dollar, or had a piece of money on the bar, you made some remark and turned to me and asked me if I was not going to have a drink, or something of that kind at that time? A. No, sir.

Q. You don't recall?

A. After I had been introduced to Mr. Brown?

Q. Before you were introduced to Mr. Brown?

A. No, I know I didn't because if you had told me before that he was a juror I would have felt a little bit queer about it.

Q. I am asking you if when you came in there, and before you had met Mr. Brown, if you didn't turn to me, and say, "Won't you [240] have a drink with us?" and didn't you then take a drink, and didn't Mr. Brown take a drink with Mr. Kelly? A. No.

Q. And then didn't I step back, Mr. Cowley, and then you said to me, "Ain't you going to take any drink or cigar." I said, "No." And you made this remark, or someone in the crowd, "I suppose you will take a drink now that Brown is gone," and I said, "Yes, but I didn't want to take a drink when the juror was there?"

(Testimony of Stephen Cowley.)

A. No, sir, you are confused, Mr. Wheeler. You and Galen were the two men that I bumped into just as I went into the bar. I didn't notice anybody else. You were standing at the extreme end; I got a glimpse of you and I went into the hotel, going to the clerk's desk, and you were the man that I had in mind when I went in expecting to treat. I said, when I came up, I said, "Are you fellows soaking up heat without buying anything?" and then Kelly, said, "No, we are having a drink; come on." Of course, my first remark was addressed to you and Galen, and then Kelly's voice attracted me, and I noticed him there. I didn't see Kelly when I went into the bar-room.

Witness excused. [241]

Testimony of D. C. Sweeney, for Defendants.

Whereupon D. C. SWEENEY, a witness called and sworn on behalf of the defendants testified as follows:

Direct Examination.

(By Mr. METTLER.)

Q. What is your full name, Mr. Sweeney?

A. D. C. Sweeney.

Q. Where do you reside? A. Helena.

Q. How long have you lived here?

A. Over forty years.

Q. How? A. Over forty years.

Q. And are you acquainted with Mr. Galen?

A. Yes, sir.

Q. How long have you known him?

(Testimony of D. C. Sweeney.)

A. A good many years.

Q. Many years? A. Yes, sir.

Q. What business are you engaged in?

A. Contractor.

Q. You were one of the jurors that were engaged in the trial of the case of the United States against Alderson, and Rae, and others, were you not, Mr. Sweeney? A. Yes, sir.

Q. You are therefore familiar with the arrangement of the two tables that existed during the latter part of that trial at least, and the relative positions of the attorneys around those tables, are you not?

A. Yes, sir.

Q. And you are also familiar with this small aisle between the two tables? A. Yes, sir. [242]

Q. Now, Mr. Galen during the progress of that trial was inside of that small aisle between the tables?

A. He was so; yes, sir.

Q. Had the attorneys occupied the same positions respectively during the latter part of the trial, at least, did they not?

A. Yes, they did.

Q. You may state if you remember the five minutes recess that was taken on Friday afternoon, the day that the trial was concluded during the address of Mr. Wheeler, the closing address of Mr. Wheeler to the jury. Do you remember that?

A. That was in the afternoon.

Q. In the afternoon? A. Yes, sir.

Q. Do you remember that incident of the five minute recess? A. Yes, sir.

(Testimony of D. C. Sweeney.)

Q. Now, when that recess was announced by the Court, do you remember what the jury did, what the members of the jury did?

A. Why, I think a majority of them went out in the hall.

Q. And in passing, where would they go?

A. Why, they would come right through here (indicating) and then to the door.

Q. And with reference to Mr. Galen, where would they pass, how close to him?

A. Why, if I remember right, the stenographer's desk here was between Mr. Galen and the jury.

Q. They would first have to pass around the stenographer's table, and then around one of these long attorney's table? A. Yes, sir.

Q. I will ask you if at the time of that recess that I have called your attention to, you observed the juror Warner whisper to Mr. Galen, or speak to him in any way? [243]

A. I did not; no sir.

Q. You did not?

A. I did not; no, sir.

Q. Would it have been possible for him to have spoken to Mr. Galen without leaning over the table to do so?

By Mr. WHEELER.—That is objected to as calling for an opinion and conclusion of the witness.

By the Court.—Objection sustained.

Q. Would you be able to state, Mr. Sweeney, whether you went out first, or whether Mr. Warner went out first at this time?

(Testimony of D. C. Sweeney.)

A. No, sir, I couldn't state.

Q. You couldn't state how they went out?

A. No, sir.

Q. Do you remember this, at the time that you went out was Mr. Galen still between the two tables, or had he left there?

A. My impression is that he was still in his position.

Witness excused. [244]

Testimony of D. M. Kelly, in His Own Behalf.

Whereupon D. M. KELLY, a witness called and sworn in his own behalf, testified as follows:

Direct Examination.

(By Mr. EVANS.)

Q. Your name, Mr. Kelly.

A. D. M. Kelly.

Q. You are one of the persons charged with contempt in this proceeding? A. I am.

Q. What is your profession, Mr. Kelly?

A. Attorney-at-law.

Q. How long have you been practicing law?

A. Twelve years.

Q. And where?

A. Well, in Jefferson County, until January 1st, 1913, at Whitehall, and at Boulder. I was in Helena from the first of January, 1913, until the first of June, 1915, and since then in Butte.

Q. Where did you obtain your law education, Mr. Kelly.

A. At the University of Iowa, Iowa City, Iowa.

(Testimony of D. M. Kelly.)

Q. What, if any, official position as an attorney have you held in these twelve years, and for how long, and where?

A. I was county attorney in Jefferson County for two terms, and Attorney General of this State for two years and five months, from the first of January, 1913, until the first day of June, 1915, when I resigned.

Q. Mr. Kelly, who was the leading candidate against you in the convention when you were nominated as Attorney General?

By Mr. WHEELER.—Oh, that is objected to as incompetent, irrelevant and immaterial, not tending to prove, or disprove any issue in the case as to whether I was a candidate against him for Attorney General. [245]

By the COURT.—Well, let us hear it.

A. Mr. Wheeler, District Attorney here.

Q. Mr. Kelly, where did you reside as County Attorney of Jefferson County, what town?

A. At Boulder, the county seat.

Q. When you were Attorney General here at Helena—you were Attorney General here at Helena?

A. Yes, sir.

Q. Since then you practiced where; did you say?

A. In Butte, Silver Bow County.

Q. You were one of the attorneys for Messrs. Alderson and Rae in this case, as they have testified about? A. I was.

Q. You were here all through that trial?

A. I was.

(Testimony of D. M. Kelly.)

Q. How long have you known Mr. Brown, the foreman of the jury?

A. I should say twelve or fourteen years, I don't know,—I don't just know,—at least twelve years.

Q. How far is his home near Jefferson, from Boulder, the county seat where you lived?

A. About fourteen miles.

Q. What, if anything, did you know of his circumstances as to being a prosperous farmer and stock-grower there?

A. I knew that he was. I have known him very well, particularly well for the past ten years, nearly eleven years.

Q. Through the ten or twelve years of your acquaintance, Mr. Kelly, what was the fact of your having met Mr. Brown occasionally?

A. I met him a great number of times. He came to Boulder a great deal for the transaction of business, and while I was in Jefferson County, I was more or less in politics all of the time, and attended conventions with Mr. Brown, and [246] visited his place in canvassing for election, and he has served on juries where I was prosecuting in Boulder. I have known him in that way very well for at least ten years.

Q. During that time, to what extent have you taken drinks with him, or he with you, together?

A. Well, quite often. It was the most usual thing in that little town of Boulder for fellows who did take a drink, when some of the boys came in from out of town, to invite them to have a drink, and it

(Testimony of D. M. Kelly.)

was a very common occurrence, and it has been ever since I have lived there. It is a sort of a custom. A matter of passing importance.

Q. Now, Mr. Kelly, you recall the incident that has been testified to here, to your buying Mr. Brown and others, a drink in the Placer Hotel that night?

A. Yes, sir.

Q. Will you describe where you had been, where you came from, and generally what happened at the bar, in your own way?

A. Mr. Galen and myself went to his office that evening some time shortly after dinner perhaps seven thirty or eight o'clock, I don't recall, and we returned to the Placer Hotel around probably ten thirty; I am not sure as to the time. I know we spent two or three hours in Mr. Galen's office that night in discussing this case, and particularly the instructions of the Court. And we came back to the hotel, and came into the main entrance from Main Street, and turned to the left, and walked into the bar-room and Mr. Wheeler was there.

Q. Just a moment. Did you stop in the lobby at all? A. No, sir.

Q. Either you or Mr. Galen?

A. No, sir, we did not.

Q. Go ahead. [247]

A. On coming up to the bar I laid a dollar on the bar, and I think Mr. Galen walked through toward the door, that is, toward the front door, and someone invited me to have a drink with them, they were drinking there, and I did that while Mr. Galen was

(Testimony of D. M. Kelly.)

gone down to the front end of the bar. He came back up and talked to Mr. Wheeler and I think Mr. Rankin was still there at that time; I am not so sure. Mr. Rankin, I know, left the bar-room at some time, and I then proceeded, with these parties whoever I took the drink with, I am not sure, and I have made inquiries because the bar-room was crowded with people, and I have been unable to find anybody who remembered being there at that time, excepting Mr. De Hart and Mr. Brown. De Hart is not certain as to any particular time that he was there, but I left my dollar on the bar—

Q. Just a moment. Do you recall that De Hart was there that night?

A. Yes, De Hart was there when I went in, and was drinking with the party that was drinking down at that part of the bar. This was somewhere between the east end of the bar and the middle of the bar. I am not just prepared to say. I think there were some people between myself and Mr. Wheeler and Mr. Rankin at that time, who afterwards went out, as to who they were, I am unable to say, but after they did go out we were partaking of the drink, why, Mr. Brown came up and stood by me on the left hand side, and Mr. De Hart was, perhaps one or two persons down from there, I am not sure, but when I went in, Mr. Brown was talking to Mr. De Hart further down the bar than where I stopped with the gentleman with whom I did stop. I don't recall that I saw Mr. Wheeler and Mr. Rankin when I went in there any more than I recall seeing anyone [248]

(Testimony of D. M. Kelly.)

else in particular, other than Mr. Brown and Mr. De Hart. I recall that they were there now, because I talked with them that same evening immediately after that. Just then Mr. Cowley came into the bar and made some remark, such as he was testifying to, about whether or not any one was buying a drink. I told him I was buying a drink. I invited Mr. Wheeler to have a drink, and Mr. Galen. I am satisfied at that time that Mr. Rankin had left the bar, because had he not, I should have invited him to have joined us. After the drink was taken, which was just a few moments, I walked up to the bar to where Mr. Wheeler and Mr. Galen and Mr. Cowley were, and found that they were discussing the propriety of buying a drink while juror Brown was in there, and I said to Mr. Wheeler that Mr. Brown was a very high-class citizen, that he certainly would not consider a matter of that kind, and Mr. Wheeler said, that he knew he was, and as far as I recall, that was practically all that was said there while I was there.

Q. Mr. Kelly, in buying a drink for those men, including Mr. Brown, Mr. Kelly, did you have any idea in your mind at all that it would, or might, or could influence Mr. Brown in any way, as a juror?

A. No, sir, it never occurred to me at all, until Mr. Wheeler spoke to me about it, or someone there. They were discussing it when I came up to where they were.

Q. Did it occur to you at all about it being improper at that time? A. No, sir, it did not.

Q. Did the thought ever enter your head at all?

(Testimony of D. M. Kelly.)

A. No, sir, never thought of it at all, in fact, I knew if I had thought of it, from what I knew of Mr. Brown, that [249] if he felt that anyone was attempting to buy him a drink for the purpose of gaining favor with him, currying favor with him on a matter of that kind, it would do you an injury, because Mr. Brown is not that kind of a citizen, and I knew it, and have known it for a long time.

Q. Did you converse with Mr. Brown at that time?

A. If I did, I don't recall. I don't recall introducing him to Mr. Cowley. I might have said something to him, or he may have said something to me. I don't remember.

Q. If he did, was it *was* just a casual conversation?

A. Why, yes; just casual conversation. There was no topic of conversation between Mr. Brown and myself. Prior to Mr. Cowley coming in, as I say, I was talking to someone else who stood to my right; I cannot recall who it was, someone that went out. I don't recall who it was.

Q. Well, did you at that time, or any other time talk to Mr. Brown about this case, or anything connected with it? A. No, I never did.

Q. And did you at any other time talk to Mr. Brown with a view of influencing his action in this case? A. No, sir, I certainly did not.

Q. Did you have at any other time than that—did you have any conversation with Mr. Brown during the trial of this case?

A. Well, if I did, I don't recall it. I know I saw him around the lobby of the hotel perhaps on one or

(Testimony of D. M. Kelly.)

two occasions. Whether or not I ever said more than, how-do-you-do, or passed the time of the day, I cannot recall. I had no business to talk with him, and if I had any conversation with him, or said anything to him, it would not be more than asking him about the weather, or something of that kind, just a casual conversation, if I had any, and I don't recall [250] that I had any.

Q. Mr. Kelly, you know the juror Warner?

A. Yes, sir.

Q. Where was Mr. Brown at the bar—I forgot to ask you that—when you put your dollar down?

A. Well, I don't know; he was further down.

Q. Was he at the bar when you did that?

A. I rather think he was standing down to my left with Mr. De Hart. They were reasonably close together. The bar-room was crowded with people who were drinking, standing behind each other, because at that time of the evening, the bar-room was crowded on that evening, as it is every evening, or has been since this legislature has been in session.

Q. And he was at the bar then between you and Mr. Wheeler and Galen, up at the other end?

A. No, he was to my left, and farther down. There were some gentlemen between Mr. Wheeler and Mr. Rankin, if I remember correctly, and myself, but who they are, I am unable to tell, who they were, I don't know.

Q. Now, did you give Mr. Brown any special invitation to drink, or just include him with the rest?

(Testimony of D. M. Kelly.)

A. No, I didn't give anybody any special invitation to at the time. I remember turning to my right, because the gentlemen to my right were not in the party that was invited to drink, so I bought the drink for those and included the gentlemen to my right, which included Mr. Wheeler and Galen, I think Mr. Cowley came in some time before, or immediately after the time that I had invited Mr. Wheeler and Mr. Galen.

Q. Was Mr. Brown invited in the party to drink, in the first one you did take?

A. That is my recollection. I don't know if I saw Brown, [251] I don't remember particularly before or after I came in; I don't just recall.

Q. Just to cover it generally, at any time in this case—at any time during this case, did you do anything or say anything with any intent or idea of influencing Brown in any way as a juror?

A. Absolutely not, only what I said here in the courthouse.

Q. I mean, outside of acting as attorney here?

A. No, sir.

Q. When did you first know the juror Warner?

A. Here in the courtroom. I never saw Mr. Warner until the opening of this trial.

Q. Did you converse with Mr. Warner at any time during this trial?

A. Well, I did. He conversed with me.

Q. Tell what happened and where.

A. The only incident that I recall, I think the only time I talked to him was on two occasions on the

(Testimony of D. M. Kelly.)

same evening. The one was not in my mind until it was recalled to my mind here this evening, or rather here during this trial, and also down at the hotel on last evening. I was talking with Senator Jones from Meagher County, and he reminded me, knowing of the trial that he was talking with me near the cigar-stand one evening when Mr. Warner came up and asked me if he might see me, or talk to me. I don't remember just what he said, and I told him, begged his pardon, and told him I was busy just then, or something to that effect, and turned and told Senator Jones that he was one of the jurors in this case, and he was a stranger to me and I have never known him before, and that I would rather he would not attempt to talk to me about anything. A little bit later, I was standing out from the [252] cigar-stand—I don't know whether it was a few minutes, or perhaps half an hour, or an hour, or two hours afterwards. Mr. Warner came up to me and handed me this bill—I think it is the bill that was exhibited here. At any rate, it was a bill concerning some railroad legislation that he was interested in, and I looked at it casually, and he asked me what I thought about it. I told him I didn't know anything about the railroad business, or what the effect of this bill was. He said if I would introduce him to the members from Silver Bow County, the members of the House, and I told him that he had better wait until after this trial, that I didn't care to do it now, or words to that effect. I am not just sure what my statement was to him, but he went away, and I turned around and Mr. Rae and

(Testimony of D. M. Kelly.)

Mr. De Hart were standing right behind me. This was right in front of the steps coming down from the elevator to the dining-room in the Placer Hotel, on the main floor of the lobby. I turned to Mr. Rae, and I think Mr. McDonnough *were* standing at the post there, the large concrete marble post there at the foot of the stairs, and I told them that I didn't feel very comfortable talking to this juror, because I didn't know him, and he seemed to be quite enthusiastic about this bill of his. Further than that I don't recall having any conversation with Mr. Warner at any time during the trial.

Q. Now, in what you said to him, Mr. Kelly, did you have any intent or idea of influencing him in your being courteous to him to the extent that you were there?

A. I rather felt the contrary, I felt that perhaps he might resent my refusal to introduce him to members of the House. I felt the necessity of being as courteous as I could be, owing to the fact that he was a juror, and yet [253] not offend him. I didn't feel in a position to chastise him, or to rebuke him for asking me to introduce him, but I didn't feel that I should do it because he was a stranger to me, I didn't know who he was, or anything about it. I will say very frankly if he was a man whom I knew, as I know Mr. Brown, if he had asked me about it, I wouldn't have thought anything about it, asked me for a favor of that kind, I wouldn't have thought anything about it, I no doubt would have introduced him to the people that were about the lobby, to any

(Testimony of D. M. Kelly.)

people that I knew about the lobby, but I didn't feel like doing it for Mr. Warner. I didn't introduce him to anybody with the exception of one or two members of the House.

Q. At that time, were there members that you did know to whom you could introduce him, right there in the lobby?

A. I have no doubt there was, because it was in the evening and the lobby was quite full of people. I didn't look to see, or make any efforts to find out, because I didn't intend to do it, and I told him he had better speak to me about it or wait until after the trial, or something to that effect.

Q. That was the only conversations you had, the two conversations that you had that evening at any time during this trial with Mr. Warner?

A. Yes, that is true.

Q. Did you at any time buy a drink, or drinks for Mr. Warner, or he for you?

A. No, sir; I never saw Mr. Warner in the bar-room.

Q. Outside of the intercourse or communication in the courtroom, or argument, was that the extent of your intercourse or communication with Warner during this trial? A. Yes, it was.

Q. Mr. Kelly, did you walk around in the neighborhood of [254] the Federal Building here the night the case was being considered by the jury after it had been submitted? A. Yes, I did.

Q. At what time, and with whom? Just describe your movements.

(Testimony of D. M. Kelly.)

A. Why, the first time I came up in this direction was with Mr. Lamb and Mr. Rae, some time, I think, shortly after midnight we left the Placer Hotel and walked up Main Street across Edwards Street, and up Park Avenue, and we came to this street which has been called Park Street,—called Clark Street, I don't know. We walked up on the other side, walked up to the head of the street to observe if we could, whether or not the jury had retired, or were still deliberating. We came back and went down after that trip, went into the Eddy Hotel, or Eddy Cafe rather, and had a lunch. Mr. Lamb and Mr. Rae and myself. After eating our lunch we came out and went to the Placer Hotel. Mr. Rae was somewhat nervous, I was myself. I guess we went and walked around again, likewise Mr. Lamb, and came back up here the second time. I don't know what the hour was; it was probably two or after when we came out here, down to Park Avenue. Why, Mr. Rae said he thought he would go home, and Mr. Lamb and I walked around Park and Edwards to the Placer Hotel, and I, after we were down there, I think Mr. Rae came back to the hotel, I am not sure, but at any rate later in the night, probably three o'clock, I came back up to see if Mr. Rae was around. He had got astray from us. Mr. Lamb and I were in the Placer, Mr. Lamb decided to go to bed. I knew that Mr. Rae was nervous, and I came up in this direction again, I came up Park Avenue, about the time I got up to the

(Testimony of D. M. Kelly.)

corner I saw someone *coming of* the building here, and I waited to see who it was, and it was Mr. Ashbridge, the marshal. I asked him whether or not the jury [255] had agreed, and he said they had not, and he was going down town to see about getting him breakfast. We walked downtown together, and he went into the Eddy Cafe, and I walked up to the Hotel, and went to bed. That was probably half-past three or four o'clock in the morning.

Q. What was your purpose in coming around to the Federal Building?

A. Just to find out whether or not the jury had retired, or agreed upon a verdict. Just a natural anxiety that a person has that is interested in a case, as I was.

Q. Was there any other motive at all in walking around this way. A. Absolutely none.

Q. Any signalling done other than you have described? A. Why, no, of course not.

Q. Any talking, or anything of that kind?

A. No, sir; or suggestions of any kind. Somebody might have motioned with his hands when he was talking; I have no recollection of that, of course, that might have occurred.

Q. Did you stop over on the southwest corner of Park and Clark Street?

A. Well, I don't recall that we did. We might have stopped there and talked; I don't recall.

Q. Was Mr. Lamb fairly talkative?

A. Yes, Mr. Lamb was quite talkative.

(Testimony of D. M. Kelly.)

Q. Do you recall Mr. Rae at any time leaving the party for a moment, and going to the porch over here for a moment? A. Yes, sir.

Q. And went behind the porch, and joined you later? A. Yes, sir.

Q. Mr. Kelly, on the Friday or Saturday before the— [256] at any time on either of those days before this case came on for trial, the Alderson-Rae case, did you, or did either of the defendants Rae or Alderson, have a copy of the jury list, to your knowledge?

A. No, sir, they did not; we had been making an effort to get it for three or four days. We had some names that had been gleaned in some way, I don't know, I think Mr. Alderson brought those up, of jurors whom he had been informed had been served, and as I recall it, I think I called up my brother, at Boulder, on one of those days, to see whether or not he knew of any jurors out there having been served on the jury list. Mr. Galen had gone to the clerk's office and attempted to get a jury list, so he advised me, and on Saturday night I met the marshal in the lobby of the Placer Hotel, Saturday night before the trial, and went to him, and asked him whether or not the jury list had been returned, and he said that he thought not, as I recall it, and I asked him what the object was in keeping the jury list from us. I said there were at least ten defendants in this case, and we had ten peremptory challenges which we must exercise jointly, and this jury, in a large measure would be strangers to most of

(Testimony of D. M. Kelly.)

us, if not all of us, and we thought it was unfair on the part of the Government to secret this jury from us, while the United States District Attorney, and the special agents were investigating, the names who were on the panel. Mr. Ashbridge told me that he couldn't help that, that those were his instructions from the United States Attorney. I told him I appreciated his position. That was Saturday night. We didn't have any jury list, and couldn't get one.

Q. Just to cover the matter generally, at any time during [257] this trial, or before the trial, did you talk with any juryman, or cause anyone else to talk to any juryman in this case about the case, or with the idea of influencing them in this case?

A. Absolutely not; no, sir.

Cross-examination.

(By Mr. WHEELER.)

Q. Mr. Kelly, you recall talking to Mr. Brown in the lobby of the Placer Hotel?

A. No, I have no recollection of having talked with him.

Q. Would you say now, Mr. Kelly, that you didn't talk with Mr. Brown in the lobby of the hotel, and about the center of the lobby of the Placer Hotel on the night that you purchased him a drink in the Placer bar?

A. No, I am satisfied I did not. I know I did not prior to that time, because I was up to Mr. Galen's office during all that evening from immediately

(Testimony of D. M. Kelly.)

after dinner until the time that Mr. Galen came into the bar, I didn't leave the bar until after the incident that has been described.

Q. Will you say now that you did not at any time talk to Mr. Brown during the course of this trial in the Placer Hotel for some few minutes?

A. Oh, I might have; I wouldn't say that I did not.

Q. How?

A. I might have; I wouldn't say that I did not at all.

Q. You wouldn't say that you didn't hold a conversation with him in the Placer Hotel?

A. At some time I might have.

Q. During the course of the trial?

A. Yes, I may have.

Q. Let me ask you, Mr. Kelly, if it is not a fact that Mr. Murphy and myself were standing about ten feet away from you [258] at one time?

A. I don't recall; you might have been.

Q. And wasn't that on the night that you came into the bar afterwards with Mr. Brown?

A. No, I never came into the bar with Mr. Brown.
Witness excused.

DEFENDANTS REST. [259]

REBUTTAL.

**Testimony of Mrs. Sidebotham, for the Government.
(In Rebuttal).**

Whereupon Mrs. SIDEBOTHAM, a witness called and sworn in rebuttal, testified as follows:

(Testimony of Mrs. Sidebotham.)

Direct Examination.

(By Mr. WHEELER.)

Q. Mrs. Sidebotham, do you know Mr. J. A. McDonough, the attorney who was on the witness-stand this morning? A. Yes, sir.

Q. During the trial of the case did you have a conversation with him? A. Yes, sir.

Q. Respecting the jury?

A. Well, yes, it was respecting my husband first, and the jury question came up.

Q. Let me ask you if this examination,—what did he say to you with reference to the jury.

By Mr. METTLER.—We object to this question for the reason that it is not proper rebuttal; that it is not an impeaching question; and the proper foundation for an impeaching question has not been laid, and that if it were an impeaching question, it is upon a matter entirely immaterial to any issue in this case.

By Mr. WHEELER.—It would show the interest, or lack of interest of McDonough, whose testimony was given here. He stated when the question was asked him this morning, if he didn't make the statement to Mrs. Sidebotham—

By the COURT.—There is a way to impeach a witness, and if you don't follow that way, you are limited or bound by the answer.

By Mr. WHEELER.—I will ask her the question.

Mrs. Sidebotham, who was present at the time that you had this conversation with McDonough?

A. I think my husband's mother was present.

Q. How? [260]

(Testimony of Mrs. Sidebotham.)

A. I think my husband's mother was; I am not sure. We were all standing right here in the courtroom talking.

Q. Where is she now? A. She is at home.

Q. At the time that you had the conversation with him, state whether it was here in the courtroom.

A. Yes, sir.

Q. Do you remember what day it was.

A. I don't remember the day, but it was the day that the defendants said they would have no witnesses.

Q. I will ask you if on that occasion Mr. McDonough said to you, used this language in substance: "You don't need to worry, because the jury is safe," or "the jury is fixed"?

By Mr. METTLER.—We object to that for the reasons already stated, without repeating them, to the last question to which objection was made; for the further reason that the impeaching question as now put to the witness is not the one that was put to Mr. McDonough.

By Judge PIGOTT.—What possible difference can it make what McDonough told this witness? How could that affect the defendants?

By the COURT.—The testimony here has taken a very wide range. The feature of a case of this sort, or a proceeding of this sort is, that it inevitably, to a certain extent, brings up an inquiry in reference to the fidelity of the jurors, and questions are asked which indicate very serious matters and things,

which are not followed up afterwards with proof, and does not tend to further the cause of justice, nor respect for the Court, nor the jury system. If there is any real reason to believe apart from anything that might effect these defendants on trial, that there was any corruption, why, there is a place where it can be thoroughly investigated, and in secret, so that, if there [261] is any real basis for it, there it can be brought out, if there is not, why, no scandal follows. Furthermore this question asked of Mr. McDonough was not put as an impeaching question. An impeaching question must be put, giving the time, place, persons present. That was not asked him, and under such circumstances the rule of law is, that you cannot thereafter impeach him. You are bound by his answer. Another rule of law is, that if it is a collateral matter, and it is collateral to these two respondents, or defendants at bar on trial, why, you are equally bound by his answer, so far as his answer, is concerned. Of course, if it can be followed up, and the purpose would be to show that these two defendants had done the things, and that question put to Mr. McDonough, and this lady, might be different, but here, even now, the question is in the alternative, conjecture.

Did he say the jury is safe, or the jury is fixed? There is a very wide difference in the meaning. It won't do to guess between them. An attorney may properly express to this witness, in her distress, that the jury is safe, with an entirely harmless meaning attached to it, and yet, her recollection might be that

it was safe or fixed, and if we take that conjecture, that he said it was fixed, why, there is a very different meaning to be attached. It is a matter not to be speculated upon. The objection will be sustained.

By Mr. WHEELER.—Note our exception.

By Mr. WHEELER.—We rest.

By Mr. WHEELER.—Your Honor has heard all of the testimony in this case, and we are perfectly willing to submit it to the Court without argument.

By the COURT.—If there is any law, I would like to see it, or hear it. [262]

Judgment.

Whereupon, said matter was argued by counsel for the respective parties and thereupon submitted to the Court for its decision, and said matter was then and there taken under advisement by the Court.

Thereafter, and on the 13th day of June, 1917, the Court made and entered its judgment, which judgment is in words and figures as follows, to wit:
(Title of Court and Cause.)

This matter coming on regularly to be heard in open court on the 7th day of February, 1917, B. K. Wheeler, United States Attorney for the District of Montana, and Homer G. Murphy and James H. Baldwin, Assitants United States Attorney for the District of Montana, appearing on behalf of the United States, and L. O. Evans, W. T. Piggott, F. L. Mettler and Frank C. Walker, appearing as counsel on behalf of respondents, and after the conclusion of the testimony offered on behalf of all parties said matter was argued by counsel for the respective parties and

thereupon submitted to the court for its decision; and thereafter on the 13th day of June, 1917, the Court, after having fully considered said matter, rendered its decision herein, which is hereby made a part hereof, wherein and whereby the Court found that the accusations in the information are true and that respondents' conduct constituted misbehavior obstructing the administration of justice as charged, and that the respondents did commit a contempt of this court, and ordered and adjudged that for such contempt each of them is fined in the sum of \$500.00 and costs.

It is therefore considered, ordered and adjudged by the Court that the said Daniel M. Kelly and Albert J. [263] Galen did commit a contempt of this court as alleged in the information herein, for which contempt it is ordered and adjudged that each of them be fined in the sum of \$500.00 and costs taxed at One Hundred Sixteen and 65/100 Dollars.

Entered July 7, 1917.

GEO. W. SPROULE,
Clerk.

And the findings, decision and opinion of the Court, by reference made a part of said judgment, are, in words and figures, as follows, to wit: [264]

United States District Court, Montana.

In re D. M. KELLY and A. J. GALEN.

Opinion.

In these contempt proceedings the charges are that respondents were attorneys for two of ten defendants in a criminal case tried herein, and therein

were guilty of misbehavior obstructing the administration of justice, in this, viz., that during intervals of the trial they knowingly visited and conversed with certain members of the jury, "with a view of improperly influencing" them in said case; that with like view Galen so visited and conversed with Juror Warner, furnished him with liquid refreshments, and with him partook thereof; that with like view Kelly so visited and conversed with Juror Brown, and furnished him liquid refreshments; that with like view both respondents so visited and conversed with Juror Warner, and promised to introduce him to members of the legislature then in session, to secure him support for a proposed bill which Warner was promoting.

After some rather technical objections, not argued, respondents plead not guilty. Although the record and evidence in the criminal case cannot be resorted to nor considered because not introduced at the hearing herein, from the evidence submitted at said hearing enough appears to demonstrate said criminal case was of importance, attracted attention, was on trial some two weeks, and respondents' clients were acquitted. There was a total of seven attorneys for the defense, but respondents were the only attorneys for their clients.

Referring to the charge affecting Kelly in relation to Juror Brown, Murphy, Assistant District Attorney, for the prosecution testified that one evening during the trial, he was with the District Attorney in the Placer Hotel lobby, and saw Kelly and Brown talking together, standing about the center of the

lobby, for 15 to 20 minutes, [265] Murphy then departing.

Rankin, since said trial, attorney for two said defendants convicted, and a sympathetic friend and sometime ally of the District Attorney, delighted with the acquittal of respondents' clients, for the prosecution testified that in said lobby, apparently following Murphy's departure, he, Rankin, in conversation with the District Attorney, there saw Kelly and Brown talking together; that after some moments witness and the District Attorney went into the adjacent bar-room and drank with Galen; that Kelly and Brown came into the bar and the District Attorney remarked they were about or going to drink; that Cowley, another attorney for a defendant in the criminal case, was about to or did invite witness and the District Attorney to drink, the latter remarked he would not drink with a juror, and moved by discretion witness withdrew.

Juror Brown, a "substantial rancher," old and close friend of Kelly, for the prosecution testified he did not remember talking to Kelly during the trial, in said hotel lobby; that he did not go into the bar with Kelly, but thinks on the occasion referred to he did with De Hart; that Kelly was there and asked him to drink, which he did; that he and Kelly were accustomed to drink together; that (in response to leading questions on cross-examination) he was positive he did not talk with Kelly during the trial, and that the drink no wise influenced his verdict; that when he had drank, he thought he should not be there and walked out.

De Hart, for respondents testified to entering said bar with Brown, but is unable to identify it as the night Kelly and Brown drank together.

Galen, respondent, testified that he and Kelly went from Galen's office to said hotel and bar; that a crowd was present and he lost Kelly, but saw Rankin and the District Attorney and conversed with them; that he heard Kelly ask the District Attorney to have a drink, and saw Juror Brown along side or back of Kelly; that to Galen the District Attorney criticised Kelly's association with the juror, Galen responding "he means no harm"; that he does not know where Kelly went when he and Galen [266] entered the bar, but does not think it was 20 or 30 minutes later that the drink was had but only an "appreciably short time"; that he did not see Kelly introduce Brown to Cowley; that Brown went out and the District Attorney adversely commented on the incident, Kelly responding he had known Brown a long time, a "high-class citizen" whom a "drink wouldn't bother."

Cowley, for respondents testified that as he entered the bar, Kelly said he was buying a drink; that Brown had drank and Kelly introduced Brown to witness, Brown then leaving; that the District Attorney said he would then drink, but did not want to drink with the juror; that witness said (because of circumstances) he saw nothing "wrong in this." And on cross-examination he testified that if before he was introduced to Brown he had been told Brown was a juror, he "would have felt a little bit queer about it."

Kelly, respondent, testified that he knew Brown well for some 10 years; that they were of like politics, and witness had held office in Brown's county; that it was custom for them to drink together; that going with Galen from the latter's office to the hotel bar, they were separated along the bar; that Rankin withdrew and witness drank with some parties; that he recalls De Hart and Brown; that he joined the District Attorney, Galen and Cowley, and found they were discussing the propriety of buying a drink while Brown was there; that he assured them Brown was a "very high-class citizen" who "certainly would not consider" it; that it never occurred to witness, when buying the drink for Brown, that it was improper and might influence Brown as a juror; that he does not recall conversing with Brown in the hotel lobby and does not remember introducing Brown to Cowley; that if he conversed with Brown it was casual, at no time about the criminal case; that he does not recall having any conversation with Brown during the trial though he might have and would not say he did not; that he gave no special invitation to Brown to drink, but included him in the party; that he did not go into the bar with Brown. [267]

In the matter of the charge that Galen furnished liquid refreshments to Warner, while it fails of proof it appears from Haven's (lawyer, witness at the criminal trial and associate of the District Attorney) testimony that one evening during the trial, in said hotel lobby he saw Galen stand, look, joined by Warner they conversed about one minute, then together

went beyond and behind a post (pillar) and out of Haven's vision where were only the bar entrance and a stairway descending to a basement toilet-room.

It also appears from Atkinson's testimony that at the conclusion of the criminal case Warner admitted to the District Attorney that he, Warner, had drank with Galen. It also appears that subpoenaed by the prosecution for this hearing, Warner came to Helena, on the street met Galen who told him to go to Mettler's office (one of respondent's counsel) which he did, from whence on call from the District Attorney he went to the latter's office, and said to him he had not drank with Galen and had not told the District Attorney he had drank with Galen.

It does not appear whether or not Galen and Mettler knew Warner was subpoenaed by the prosecution, when Warner went to Mettler's office. It is not **intimated** a party should not interview witnesses subpoenaed by the other party. An exclusive right to a witness is not acquired by first subpoenaing him. Witnesses are in aid of justice. Their knowledge is for the benefit of all parties, all of whom, before trial, may rightfully, but discreetly, ascertain that knowledge.

Byrn, a Government officer, testified that prior to this last incident he heard Warner deny to the District Attorney that he had admitted drinking with Galen, then when this was vigorously disputed, said if he had drank with Galen he did not remember it.

Galen and Warner testify they did not go into the bar nor drink together, and Warner that he had not admitted to the District Attorney he had drank with

Galen, and that when he went to the District Attorney's office from Mettler's, was not the first time he had to the District Attorney denied drinking with Galen. Galen and Warner do not refer to nor identify the incident to which Haven testified. It does not appear whether or not Galen and Mettler knew Warner was subpoenaed by the prosecution, when Warner went to Mettler's office.

In the matter of the charge that respondents visited and conversed with Warner and promised to introduce him to legislators, it appears Warner was interested and industrious in behalf of his proposed bill. A stranger to respondents, Warner was recommended to enlist their aid [268] for that they were ex-attorneys general of wide acquaintance, and he sought them out to that end. Warner testified he conversed with Kelly two different evenings, and asked him if he would introduce witness to legislators; that Kelly put him off the first time, did not think Kelly introduced him, though Kelly said something about waiting until after the trial, to talk about the bill, the second time.

Byrn testified that on the evening of the eleventh day of the trial, in the hotel lobby, he saw Juror Warner approach and speak to Kelly, who told Warner he could see him later; that later Warner did approach Kelly, showed him a document, they conversed some ten minutes, and separated. Kelly testified he recalled only two conversations with Warner, both the same evening and in the hotel lobby aforesaid; that Warner showed him the bill, asked what Kelly thought of it and that Kelly introduce

him; that witness answered he knew nothing relating to the subject of the bill, that he did not care to introduce Warner then, and that he had better wait until after the trial; that he felt uncomfortable talking to a juror a stranger to him, felt necessity to be courteous and not to offend by a rebuke; that had it been Brown asking "me for a favor of that kind I wouldn't have thought anything about it. I no doubt would have introduced him to the people" thereabout.

Warner also testified he might have had two conversations with Galen, only about the bill and requesting introductions; that to the best of his recollection Galen did not introduce him, but will not say Galen did not, he, Warner, met so many; that he does not remember from the jury-box asking Galen about one Searls; that maybe at most he talked two or three times about the bill to Galen; that during a certain intermission in the final argument to the jury in the criminal case, in the court corridor Galen did not put his arm on Warner's shoulder and talk to him. On cross-examination in response to a question whether Galen had not said, "I haven't got time to talk to you about" the bill, he answered "something similar." In response to other leading questions he testified that in the said hotel lobby he was talking to one of respondents' clients—defendant, [269] and Galen approached and said he would rather Warner did not talk to said defendant, whereupon Warner asked why, Galen answering it did not look right; that he realized his error, thanked Galen, and asked if he could speak to Galen, who

assented; that then for the first time he spoke to Galen about the bill; that his verdict at the trial was not influenced by anything said to him by Kelly or Galen.

Byrn testified that the same evening he saw juror Warner approach Kelly, he saw Warner seated in the said hotel lobby, there being a fur auction and a dense crowd; that Galen approached Warner and by the latter was shown a document. Some slight conversation between them, Galen handed the document back to Warner and walked away; that he wouldn't be positive one of respondents' clients—defendant did not approach Warner at the time Galen did, and does not believe said defendant was talking to Warner when Galen approached the latter. Byrn also testified that upon this evening in said lobby he saw two other counsel for another defendant approach and speak to Warner, "several words passed," and later saw Warner speak casually to said defendant.

Kirschwing, a good friend of the District Attorney, who knew what the latter "was up against" in the trial of the criminal case, and knew "the lobby that was working" for the prosecution, testified that during the certain intermission hereinbefore mentioned, he saw Galen and Warner meet near the jury-box, saw Warner whisper to Galen, Warner followed by Galen walk into the corridor, and there saw them converse with Galen's arm around Warner's shoulder; that other jurors were scattered about in plain sight of the corridor incident.

Haven's testimony in reference to a meeting, con-

versation and departure in company of Galen and Warner is heretofore set out.

Galen, respondent, testified that Warner approached or spoke to him some four or five times during the trial; once, when Warner was talking to respondents' client as related by Warner; again, the next morning in the courtroom Warner referring to said incident, said to Galen he, Warner, should have known better; again, at the fur auction, [270] Warner handed Galen the bill, the latter only then conscious of Warner's presence. Galen looked at the title of the bill, handed it to Warner, remarking, "I haven't got time to fool with that," and walked away; again, one morning in the courtroom, in the presence of the District Attorney, Warner asked Galen the name of Searls, of whom Galen had told Warner the night before at the hotel, and Galen again told him Searls' name; again, during the intermission heretofore referred to, Galen nervous from the strain of the trial, he testified, procured a cigarette from one of his clients, went into the corridor, and while he in meditation smoking, Warner stepped up and said, "I want to talk to you about my bill," to which Galen responded, "For Christ's sake, wait until this trial is over"; that no more was said, they had not whispered or spoken in the courtroom, he had not followed Warner into the corridor, he did not have his arm around Warner, and that at no time did he and Warner speak of the case; that all these several incidents were open, other persons by; that he does not believe he introduced Warner to anyone. Neither Warner nor Galen was

asked whether or not the latter promised such introduction. It is noted that neither Brown nor Warner was a guest of the hotel of the numerous incidents, and it does not appear respondents were.

Some six witnesses, including counsel for another defendant at the criminal trial, respondents' clients, and jurors, testified for respondents to circumstances tending to disprove Kirshwing's assertion that Warner whispered to Galen before the corridor incident. There is evidence that the jury deliberated upon their verdict all night, and that around midnight Kelly and two others interested, stood for some time upon the street and looked over at the lighted windows of the jury room.

Some claim that they signalled to the jurors is made, not to be treated seriously. It also appears that immediately after the verdict was received, a defendant and his counsel meeting Warner in a hotel dining-room, invited him to partake of lunch with them, also invited Kelly, Galen and another of counsel, and all ate lunch together. A few [271] days later, these proceedings were instituted. Having in mind the charges and that the presumption of innocence requires their dismissal unless proven beyond reasonable doubt, and taking note of all matters and things in relation to witnesses and testimony that ought to be considered in the determination of issues, the findings are that during the trial of the criminal case respondent Kelly intentionally and knowingly visited and conversed with Juror Brown, and likewise furnished said juror liquid refreshment and partook thereof with him; that said re-

spondent likewise visited and conversed with juror Warner and likewise promised said juror introductions to legislators, requested by the juror to promote a proposed bill; that respondent Galen intentionally and knowingly visited and conversed with juror Warner.

Positive testimony that Kelly and Brown visited and conversed at length in the hotel lobby is not weakened by their inability to recall it. In view thereof, of their entrance into the bar, drinking together at Kelly's request and expense, the proof is satisfactory that together they went from said visit and conversation into the bar. Kelly unable to see impropriety in the drink, would see none in the visit and conversation and journey to the bar; unable to see impropriety in visit and conversation with juror Warner, a stranger, would see none in the like with juror Brown, a friend—especially when Kelly would unhesitatingly grant favors to the juror friend but not to the juror stranger. Apparently all present (even Brown) save Kelly and Galen, saw impropriety in Kelly treating Brown.

The evidence is clear that Kelly and juror Warner had a lengthy visit and conversation, that Warner's bill was discussed, that he asked Kelly to introduce him to legislators, that Kelly understood Warner's interest and purpose, and that he gave Warner to understand the introductions would be made after the trial.

Early in the trial Galen consented to Warner's speaking to him. Warner presented his bill to Galen and the latter learned the former's desires.

Galen told him the name of Searls. At different times there [272] were several exchanges of words between Galen and Warner, in themselves of no consequence, but in all serving to show how counsel and juror gravitated towards each other, like drifting ships upon a calm sea, or steel and magnet, or perhaps like men not averse to reciprocal favors. So on the day the prosecution rested, on a January evening they met in a hotel lobby, conversed, in company, walked and disappeared from view where their continuing journey must be either into the bar or down to a basement toilet.

A private visit, conversation and journey arousing warranted suspicion in view of all the circumstances, the burden shifted to Galen to explain and no explanation was made. What their conversation, where went, how long, are still a mystery. Not identifying, referring to or denying the incident, Galen and Warner only said they at no time together went into the bar or drank. The court corridor incident Warner denied *in toto*. Kirshwing then gave his version, then Galen his. Since this incident was after Galen acquiesced in speech with Warner, after several exchanges between them, after Galen knew Warner's interest and desire in the matter of his bill, after their unexplained conversation and disappearance together, after habit could breed carelessness, after Galen, apparently, saw no impropriety in the association of Kelly and Brown at the bar; and since the evidence in relation to this corridor incident was after the verdict of acquittal and the immediate foregathering of Galen, Warner and

others at lunch, after Galen sent Warner to Mettler and of which no more appears, all thereof taken into consideration with all other circumstances properly in proof stamp Kirshwing's version as more consistent and reasonable. However, involving a main issue, Kirshwing's version is not deemed proven beyond a reasonable doubt, and the incident is taken as perhaps not clear, and as merely illustrative and corroborative of the attraction between Galen and Warner.

In view of and upon these findings the conclusion must be and is that respondents' conduct constituted misbehavior obstructing administration of justice, as charged, and they are and each of them is fined in the amount of five hundred dollars and costs.

[273]

For protection, Society depends upon juries. Like all human institutions the jury system is not perfect, but Society is not yet ready to accept any substitute. A philosophical writer declares that system is all that reconciles Man to laws. One wonders if it is because the individual man contemplates his sometime violation of law, and hopes he at least may escape *via* a jury. Jurors even as Judges are officers of courts and administrators of justice. Indeed, they are *Judges* obligated to impartiality, fairness and justice. Their oath and duty are to "true verdict render in accordance with the law and evidence in the case." The law and safety of Man and property demand that oath be kept, that duty performed.

It follows that jurors must not be subjected to any variety of influence outside the jury-box. The law forbids it. Any suspicion that jurors have been improperly influenced, tampered with, is intolerable. For it impairs public confidence in juries and verdicts, creates doubts of the Courts' ability to do justice, lessens respect for law, incites violation of law and encourages primitive force to avenge or remedy wrongs, endangers persons and property, breeds mobs, riots and lynch law, and makes for disorder, crime and anarchy. Amongst the influences forbidden, is undue familiarity between jurors and counsel. It is the more dangerous in that proof is difficult and its extent and effect are indeterminable. Generally founded on friendship or other altruistic basis, its insidious appeal is to Man's finer nature; and though powerful, charged that it has influenced him, he refuses to concede it and denies its well known probable effect upon his judgment in determining his verdict. He may be honestly unconscious of it, though moved by it.

All counsel recognize this in their attempts to include their friends and to exclude their opponents' friends, when drawing juries. Drawn by chance, friends properly may be on juries, but during such times it is the duty of counsel to avoid appealing to friendship, to avoid renewing old friendships as well as to avoid cultivating new ones. It is recognized a practical view must be taken. So mere chance meetings, passing salutations, brief conversation on indifferent topics, between [274] jurors and counsel, cannot always be avoided and are not in themselves

condemned. But lengthy visits and conversations, apart from others, whether or not about the case, drinks and other hospitality, entertainment, hopes aroused and favors directly or indirectly granted or promised, are under the ban of the law, are misbehavior obstructing administration of justice, and to be penalized according to circumstances. Counsel are strictly forbidden to thus compete for jurors' favor. It is to the credit of the Bar that few counsel desire to and practically all frown it down. For the least of these methods may influence jurors, and all of them arouse suspicion, adverse comment, just resentment, impair confidence, and if permitted convert the trial into a tragedy and transform juries from administrators of justice to purveyors of injustice.

All this is conceded by respondents, but they contend their acts were but casual and commonplace courtesies, open, in proximity to other persons, and so not misbehavior obstructing administration of justice. Unfortunately for respondents, the evidence will not permit construction so favorable to them. When meetings are more or less frequent and in consequence of the known desire of the jurors, if not of counsel, are unchecked and taken advantage of, are in part by appointment, they have not the quality of casualty. The strategy of openness, the solitude of the crowd, may be safer than secretiveness, when the influence is not brazen importunity and coarse bribery, but is only friendship and favors of courtesy.

It is most disturbing to remember that respon-

dents' clients charged with felony, Warner entered the jury-room and deliberated upon his verdict (of acquittal), with Kelly's promise and Galen's extended hope at least, that after the verdict, they, men of rank and influence, would grant him favors ardently desired and solicited by him. And Brown, likewise, with consciousness of friendship renewed with Kelly, an old friend, with memory of a lengthy visit and conversation, subject unknown, with Kelly, and with whom he had during the trial made libation at the shrine of Bacchus. But it is contended respondents had no intent to influence the jurors, that the latter testified they were not [275] influenced, and hence respondents' conduct while indiscreet was not contemptuous. Lack of evil intent goes only in mitigation. They knew the jurors, they intended to visit, converse, make promises or arouse hopes, drink with one of them, all as found herein. That makes up the offense charged. Intentionally adopting certain conduct in certain known circumstances, conduct forbidden by law under those circumstances, they intentionally violated law in the only sense in which the law considers intent.

Ellis vs. U. S., 206 U. S. 257.

Their conduct was intentional, and tended to influence the jurors favorably to their clients. It is not alone a question of ultimate intent, or of mere courtesy, or little monetary value, but it is also a question of the impression the conduct may make upon jurors. Friendship, courtesy, favors, are of the great and enduring forces. In the long run, they are stronger than mere money. Ends are often

gained by good impressions created, where direct solicitation would fail. To reciprocate courtesies, hospitality and favors, is a natural impulse. A generous man remembers and responds in some kind. Only the base receive favors and return none, and untrained jurors of distant residence might hastily conclude by their verdict alone could they timely reciprocate counsel's attentions.

The conduct here involved is forbidden because of dangerous tendencies, of probable injury difficult of proof. The scales of justice are of delicate poise, and in a jury's hands may be affected by improper trifles light as air.

A juror has no measure for his mental processes. He will not be heard to say this or that did or did not influence him. Public policy forbids, because his mental state is not accessible to other testimony.

Mattox vs. U. S., 146 U. S. 148.

It is what respondents intentionally did, and its probable effect, not its intended or actual effect, that is the gist of their offending.

First sought out by Warner, upon whom they are now severe, respondents should have checked his advances. If Warner is to be [276] condemned, more, are they. For he was but a layman; they, learned in the law. And they told him he could converse with them. They encouraged him to continue to approach them. Warner's approach may have embarrassed them, and they were in duty bound to avoid offending him to their clients' prejudice. But they were equally obligated to avoid encouraging him to the Government's prejudice. It would seem

they could have relieved themselves of Warner as admirably as Galen relieved their client of Warner. Furthermore, they could and should have brought the matter to the Court's attention, and a remedy would have been applied, even to dismissal of the juror. At it is, they have their share of responsibility for a situation that attracted attention, was the subject of "talk," created scandal and that was calculated to affect the verdict, to say the least.

Perhaps the evil will be better appreciated by assuming a civil suit to have been involved, say a personal injury action against a corporation. Was this misbehavior in behalf of a successful plaintiff, a great outcry would be made anent the "ambulance chaser" and "purification of the Bar"; in behalf of a successful defendant, bitter denunciation would be visited upon the "soulless trust" and "corrupt corporation counsel." There would be some justification for both, and a new trial would be granted as of course. The cases almost unanimously so hold, and all condemn conduct like herein, as reprehensible and intolerable.

Note, the new trials granted are for misbehavior obstructing administration of justice, and the conduct when intentional is punishable as contempt of court. For contempt of court is nothing but misbehavior obstructing administration of justice. Now, although not always remembered, the Government in behalf of Society is entitled to fair jury trials, even as persons are. But in criminal cases, though it be deprived of a fair trial by conduct like respondents, the law forbids it to have a new trial. It has no rem-

edy, and can only discipline the offender and discourage imitators, by proceedings for contempt, as here.

In general, see *Scott vs. Tubbs* (Colo.), 19

L. R. A. (N. S.) 733 and notes. [277]

Sandstrons vs. Co. (Or.), 49 L. R. A. (N. S.) 889.

Bank vs. Gray (Wyo.), 154 Pac. 599.

State vs. Snow (Minn.), 153 N. W. 526.

Craig vs. Pierson (Al.), 53 So. 803.

State vs. Clark (Mo. K. C. Ap.), 114 S. W. 536.

Bradshaw vs. Degenhart, 15 Mont. 273.

Crime, its repression and punishment is a grave problem. Administration of criminal law, particularly when cases are for any reason important, is sufficiently difficult and ineffective to give color to the publicists' statement that it is a national disgrace. In so far as it is true, it is largely due to practices akin to those herein condemned. And it is so far true, not overlooking that ancient rules based on vanished reasons make more to protect criminals against society than to protect society against criminals, that statistics show this country in criminal law administration far less efficient than England, less than France, Germany and but little more than Russia.

The incident of the lunch is illustrative and significant. In some states it is a statutory offense to "treat" jurors even after verdict and during the term. In his *Penal Philosophy*, the jurist Tarde, criticising the jury system, gives credit to French juries in that after acquittal they are not known to "celebrate" with accused, and notes as worthy of

mention that Garofalo cites one instance occurring in Italy in 1879:

It is feared and lamented such celebrations are not uncommon in this country.

See *Hotel Co. vs. Sooy*, 197 Fed. 887.

Lintz vs. Ry. Co. (Colo.), 131 Pac. 261.

Counsel must remember they too are officers of the courts, administrators of justice, oath-bound servants of society; that their first duty is not to their clients, as many suppose, but is to the administration of justice; that to this, their clients' success is wholly subordinate; that their conduct ought to and must be scrupulously observant of law and ethics. And to the extent that they fail therein, they injure themselves, wrong their brothers at the Bar, bring reproach upon an honorable profession, betray the courts, and defeat justice.

When of sufficient extent, when they fail as here, they must, like others, respond at the Bar of the court.

BOURQUIN, J.

Filed June 13, 1917. Geo. W. Sproule, Clerk.
By H. H. Walker, Deputy. [278]

Thereafter, and on the 19th day of June, 1917, and within ten days after notice of the rendition and entry of said judgment, being the time allowed by the rules of said court, upon application of E. G. Toomey, attorney for the defendants, and each of them, the Court then and there granted the defendants and each of them, thirty days in addition to the time allowed by law within which to prepare, serve and present their bills of exceptions in said cause.

And now, within the time allowed by the Court, and in obedience to law, the defendants, and each of them, tender this as their bill of exceptions and as the bill of exceptions of each of them, to the action of the Court as hereinbefore recited, and ask that the same be signed, settled and allowed, as a full, true and correct bill of exceptions in the above-entitled matter.

F. W. METTLER,
W. T. PIGOTT,
L. O. EVANS,
E. G. TOOMEY,
F. C. WALKER,

Attorneys for Defendants.

Due and sufficient service of the foregoing proposed bill of exceptions acknowledged and copy received this 11th day of July, 1917.

BURTON K. WHEELER,

United States Attorney for Montana.

By HOMER G. MURPHY,

Assistant United States Attorney for Montana.

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The foregoing proposed bill of exceptions has been examined and all proposed amendments thereto accepted this 18th day of July, 1917.

B. K. WHEELER,

U. S. Attorney.

HOMER G. MURPHY,

Asst. U. S. Attorney.

Order Settling Bill of Exceptions.

The foregoing bill of exceptions having been duly served and presented for settlement within the time

allowed by law and the order of the Court, and amendments thereto having been accepted, the same is hereby signed, settled and allowed as a full, true and correct bill of exceptions and ordered filed as a part of the records in said cause, this July 18, 1917, in duplicate.

GEO. M. BOURQUIN,
United States District Judge, Sitting in Trial of said Cause.

Filed July 18, 1917. Geo. W. Sproule, Clerk. By
C. R. Garlow, Deputy. [280]

Thereafter, on July 7, 1917, Petition for Writ of Error was duly filed herein, in words and figures following, to wit:

(Title of Court and Cause.)

Petition for Writ of Error.

To the Honorable GEORGE M. BOURQUIN,
Judge of the District Court aforesaid:

Now comes Albert J. Galen, by his attorneys, and respectfully shows that on the 13th day of June, A. D. 1917, the Court found against said Albert J. Galen, your petitioner in the above-entitled matter and in favor of the United States of America, and upon said findings a final judgment was entered on the 13th day of June, A. D. 1917, against your petitioner, one of the defendants.

Your petitioner, feeling himself aggrieved by the said findings and judgment entered thereon as aforesaid, herewith petitions the Court for an order allow-

ing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this [281] behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco in said Circuit for the correction of the errors complained of, and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by petitioner in error, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals as aforesaid, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals aforesaid, and your petitioner will ever pray.

ALBERT J. GALEN,

Petitioner in Error.

F. W. METTLER,

W. T. PIGOTT,

E. G. TOOMEY,

Attorneys for Petitioner in Error.

L. O. EVANS,

F. C. WALKER,

Attorneys for Petitioner in Error.

Filed July 7, 1917. Geo. W. Sproule, Clerk.

Thereafter, on July 7, 1917, Assignment of Errors was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Assignment of Errors.

Comes now Albert J. Galen, one of the defendants in the above-entitled cause, by L. O. Evans, Wm. T. Pigott, F. W. Mettler, F. C. Walker, and E. G. Toomey, his attorneys, and in connection with his petition for a writ of error, makes the following assignment of errors which he alleges occurred upon the trial of said cause and upon which he relies to reverse the judgment against him, Albert J. Galen, defendant, and in favor of plaintiff herein, entered herein on the 13th day of June, 1917, as appears of record:

1. The Trial Court erred in denying the motion of defendant to quash and set aside the order to show cause and the citation issued thereon in this, to wit:

a. Because the information upon which said order was based and issued or made does not state facts sufficient to constitute a contempt of this court, in this, that the said information does not state the nature and cause of the charge or accusation attempted to be made therein. [283]

b. Because the facts as alleged in said information are insufficient in law to put these contemnors upon their defense.

c. Because it is apparent from the face of said

information, and the affidavit in support thereof, that the averments of said information are not supported, either in whole or in part, by any affidavit of any person who witnessed the pretended acts alleged to constitute a contempt, or contempts of this court, the only affidavit being that of the United States Attorney for the District of Montana, who therein swears that "the matters and things therein contained are true to the best of his knowledge, information and belief," and who is not stated or shown to possess any knowledge of the facts constituting the accusation.

2. The Trial Court erred in overruling the demurrer of defendant to the information in this, to wit, for that the information does not state facts sufficient to constitute a contempt of court.

3. The Trial Court erred in finding that the defendant Galen intentionally and knowingly visited and conversed with juror Warner.

4. The Trial Court erred as a matter of law in finding the defendant Galen guilty of contempt by reason of his having intentionally and knowingly visited and conversed with juror Warner, because there is no finding or evidence that such visits and conversations were for the purpose of improperly influencing such juror, or for any improper motive.

5. The Trial Court erred in finding the defendant Galen guilty of contempt of said court because the evidence in said cause is insufficient, as a matter of law, to warrant said finding.

6. The Trial Court erred in finding that the defendant [284] Galen intentionally and know-

ingly visited and conversed with juror Warner because the evidence in said cause is insufficient as a matter of law to warrant said finding.

7. The Trial Court erred in entering judgment upon the findings against the defendant Galen because said findings are insufficient as a matter of law to warrant the entry of said judgment thereon.

8. The Trial Court erred in entering judgment against the defendant Galen, adjudging that his conduct constituted misbehavior, obstructing the administration of justice as charged, because its findings do not, as a matter of law, support said judgment.

9. The Trial Court erred in rendering judgment against defendant Galen in said cause, upon the pleadings and evidence in said cause, for the reason that the evidence affirmatively shows that said defendant was not guilty of misbehavior obstructing the administration of justice.

10. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, Mrs. H. P. Umpson, and permitting the same to be answered, which said question, objection and answer are as follows:

“Q. I will ask you, Mrs. Umpson, if you don't know that he was urged to be kept off of the witness-stand by the attorneys for the defendants, and some of the defendants, and particularly by Mr. Galen and Mr. Kelly?

By Mr. METTLER.—We object to that as irrelevant and immaterial to any issue before us, and furthermore, as being hearsay on the

part of this witness, also leading and generally objectionable. It calls for hearsay testimony, not binding upon these defendants, nor by any one in their presence. We would ask to have the question divided.

By the COURT.—Objection overruled.

By Mr. METTLER.—Exception noted.

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By the COURT.—Motion denied.

By Mr. METTLER.—Exception noted.

By the COURT.—Now, will you answer the question?

A. Now, I don't know. I don't remember particularly Mr. Kelly and Mr. Galen; but that was the general advice of all the attorneys. I don't think I even talked to Mr. Galen about it."

11. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, Mrs. H. P. Umpsen, and permitting the same to be answered, which said question, objection, and answer are as follows:

"Q. Had you ever seen a jury list prior to that morning? A. Yes, sir.

Q. Where had you seen it?

By Mr. METTLER.—Objected to on the same grounds.

By the COURT.—Overruled.

By Mr. METTLER.—Note our exception.

A. Mr. Smith, Judge Smith, gave it to me."

12. The Trial Court erred in overruling the objection of the defendant Galen to a certain question

asked the witness, Mrs. H. P. Umpsen, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. Did you have a conversation with any of the defendants in the case with reference to the jury list?

By Mr. METTLER.—We object. The defendants, these two men on trial are not defendants, I take it, means the defendants in the other case, not in this case.

By the COURT.—I don't think that is material.

By Mr. WHEELER.—It is for the purpose of showing, may the Court please, that the first conversation she had was with one of the defendants that was on trial at that time, for the [286] purpose of showing,—particularly Mr. Alderson, for instance, had a copy of the jury list.

By the COURT.—She may answer. Overruled.

By Mr. METTLER.—Note our exception.

Q. Did you have a conversation with Mr. Alderson with reference to a jury list?

A. I did; yes, sir.”

13. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, Mrs. H. P. Umpsen, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. When was that?

A. I think it was Friday afternoon, or Saturday morning.

Q. And whereabouts? A. On the street.

Q. And was anything said to you, did you ask him for the jury list, or what was said? Just tell us.

- By Mr. METTLER.—I want to object to this as asking for hearsay testimony, testimony of Mr. Alderson, who can be called as a witness to prove the facts. It would be the rankest kind of hearsay evidence against these defendants.

By the COURT.—Yes, there might be some presumptions flow from it, however. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. I met Mr. Alderson and I told him we had not been able to get a jury list, and he said he thought he could help us.”

14. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, Mrs. H. P. Umpsen, and permitting the same to be answered, which said question, objection, and answer are as follows: [287]

“Q. Didn’t he afterwards ask you if you had got a copy of it, or received a copy of it?

By Mr. METTLER.—Objected to as leading and suggestive, incompetent, irrelevant and immaterial, not having to do with the case on trial here at the present time.

By the COURT.—Objection overruled.

By Mr. METTLER.—Note our exception.

A. No, I don't recall his asking me if I had it."

15. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, Mrs. H. P. Umpsen, and permitting the same to be answered, which said question, objection, and answer are as follows:

"Q. Did he state to you at that time where he got his copy of the jury list?

By Mr. METTLER.—The same objection to that question. May we have the same objection to this line of testimony, and the same ruling, and same exception?

By the COURT.—You may.

A. He did not, he didn't tell me where he got it."

16. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, D. G. Bertoglio, and permitting the same to be answered, which said question, objection, and answer are as follows:

"Q. Was anything said by you, Mr. Bertoglio, at any time during the trial of the case to Mr. Sidebotham, his wife, to Mr. Wilmot, or to Mrs. Umpsen, with reference to two of the jurors?

A. The only thing I can recollect —

By Mr. METTLER.—We will object, we interpose the same objection, irrelevant, immaterial, and also no foundation has been laid.

By the COURT.—Objection overruled.

By Mr. METTLER.—Note our exception.

A. The only thing that I can recollect is that one morning someone passed a remark that they had heard some of the jurors—two of the jurors, discussing among themselves that the Government so far, had failed to prove their case. That is the only thing that I—

17. The Trial Court erred in overruling the motion of the defendant Galen to strike out an answer of the witness D. G. Bertoglio to a certain question, which motion, question, and answer are as follows:

“Q. I say, you were anxious to fake the witness-stand? A. Yes, I was.

By Mr. METTLER.—We move to strike out the answer of the witness and object to the question on the ground that it is incompetent, irrelevant and immaterial to any issue in this case, as to what he desired,—as to what his desires were, in this case.

By the COURT.—Motion denied.

By Mr. METTLER.—Note our exception.”

18. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, D. G. Bertoglio, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. Let me ask you, Mr. Bertoglio, if the reason that you didn't take the witness-stand was not because of the fact that you were given to

understand that some of the jurors had been fixed, or that they were favorable to the defendants? A. No, sir.

By Mr. METTLER.—Just a moment. The question is subject to the objection that it is double, it is in two alternatives, and [289] it should be divided, and it is incompetent, irrelevant and immaterial, also hearsay.

By the COURT.—He asked for his reasons a little while ago.

By Mr. METTLER.—We object to it as leading and suggestive.

By the COURT.—Objection overruled, and motion denied.

By Mr. METTLER.—Note our exception.”

19. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, D. G. Bertoglio, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. What was the reason why you didn’t take the witness-stand in the case?

By Mr. METTLER.—Same objection.

By the COURT.—Objection overruled.

By Mr. METTLER.—Note our exception.

A. My attorney advised me not to take the stand, as the others were not going to take the stand. There was no use for me to take the stand, because he said there is no evidence against you.”

20. The Trial Court erred in overruling the motion of the defendant Galen to strike out an answer

of the witness W. G. Brittenstein, to a certain question, which motion, question, and answer are as follows:

“Q. What is your name?

A. W. G. Brittenstein.

Q. What is your business? A. Reporter.

Q. On what paper?

A. ‘Helena Independent.’

Q. Mr. Brittenstein, where were you on the night that the case of the United States vs. Alderson and Rae went to the jury? [290]

A. Oh, part of the time I was at some social functions, I don’t which—

Q. Well, you came up here to the courthouse that night, did you not? A. Yes, sir.

Q. Did you see any of the attorneys for the defendants in the neighborhood of the courthouse here, particularly Mr. Kelly or Mr. Alderson, or Mr. Rae?

A. Why, I passed them on my way up here.

Q. Whereabouts?

A. Why, about oposite from the Germania Hall on Park Avenue here.

Q. Who were the ones that you passed?

A. As I recollect it, it was Mr. Kelly and Mr. Rae and Mr. Lamb.

Q. Mr. Kelly and Mr. Rae and Mr. Lamb?

A. Yes, sir.

Q. What time of the morning was that, or the night?

A. Oh, I am inclined to think it was about one forty-five A. M.

Q. Where is this Germania Hall?

A. Why, it is right down near the Helena Cab Company building.

Q. On Main Street.

A. No, it is on Park Avenue there. I think that is the name of the street.

Q. Park Avenue?

A. The one that runs right past the Federal Building here.

Q. And you notified the marshal, and told him that they were down there?

A. Well, I don't remember whether I did or not. I [291] might have made some suggestion about their anxiety in the case at that time, I don't exactly recollect that, I don't know whether I told the marshal that or not.

By Mr. METTLER.—I move to strike out all of the testimony of this witness as irrelevant and immaterial, and not illustrative of any issues in this case in the remotest degree.

By the COURT.—It looks very harmless. It will stand. If it is shown to have no materiality, it will have no consideration. The motion will be denied.

By Mr. METTLER.—Note our exception."

21. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, W. B. Warner, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. You talked to him on numerous occasions about your bill?

A. On numerous occasions?

Q. Well, on several occasions?

By Mr. METTLER.—We object. We have no objection to the cross-examination of this witness, but when it goes to the extent to say ‘numerous occasions’ or ‘several occasions’ when the witness has said not to exceed two, I think it is unfair to the witness, and unfair to the defendants who are under charge here.

By the COURT.—The Court will not be influenced by such questions. Objection overruled.

By Mr. METTLER.—Note our exception.

A. Two or three times maybe at the utmost.”

23. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, W. B. Warner, and permitting the same to be answered, which said question, objection, and answer are as follows: [292]

“Q. I will ask you if it is not a fact, Mr. Warner, that he came there where you were standing, put his arm on your shoulder, and started to talk with you during the recess?

A. No, sir.

By Mr. METTLER.—We object to this question, as being in its nature an impeaching question, and it is improper for counsel to impeach his own witness. We object to the question as incompetent, irrelevant and immaterial.

By Mr. WHEELER.—The statutes provide how you may impeach your own witness.

By the COURT.—To refresh his recollection I think it is proper. There are circumstances under which you may impeach your own witness. The objection will be overruled.

By Mr. METTLER.—Note our exception.”

23. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, W. B. Warner, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. Do you recall my having asked you if you didn’t talk to Mr. Galen in the lobby of the hotel, and that then, that you and Mr. Galen went in and had a drink together, or that in substance, and you having told me on that occasion that that was the fact?

By Mr. METTLER.—I object to this question for the reason that it embraces at least three separate propositions, one of which the witness has already testified was a fact, and the other he has not testified to be the fact, and the question should be divided in fairness to this witness who is not an educated man.

By the COURT.—I don’t see how you could divide such a question. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. Yes, you told me that was the fact.”

24. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, W. B. Warner, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. I asked you if it was not a fact that you went in there and had a drink with him, didn’t I? You remember my having asked you that question?”

By Mr. METTLER.—We object further to this line of testimony on the further ground that it was not had in the presence of Mr. Galen, who was the real party involved, he was not a party to it, and not in his presence, it would be hearsay and improper for any purpose in this case.

By the COURT.—Not for any purpose. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. I cannot answer the question that way, because you add more to it.”

25. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, Joe Kirschwing, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. Did you see Mr. Galen have any *occasion* with the juror Warner?”

By Mr. EVANS.—We object to this, if your Honor please, as incompetent, irrelevant and immaterial. In that, we have no statute changing the common law, as far as we know, at the time of the admission of the Territory of Mon-

tana as a State in 1889, so that the common law would apply, so under that I don't think *it would competent*.

By the COURT.—It depends on the attitude of the witness on the stand. I think he may answer. Even if it was not, even if it is a contradiction, it would be independent evidence, and certainly admissible as such. The objection will be overruled. [294]

By Mr. EVANS.—Note our exception.

A. I saw him in the corridor.”

26. The Trial Court erred in overruling the objection of the defendant Galen to a certain question asked the witness, R. H. Adkinson, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. I will ask you if you recall my having asked Mr. Warner with reference to whether or not he talked with Mr. Galen in the lobby of the hotel, and then went into the bar-room of the Placer Bar, and had a drink with him?

By Mr. METTLER.—We object on the ground that it is an attempt to impeach his own witness.

By the COURT.—I will allow it, and we will settle the law later. If it should not be admissible, of course, the Court will give no weight to it. The objection will be overruled.

By Mr. METTLER.—Note our exception.

A. I do.”

27. The Trial Court erred in overruling the objection of the defendant Galen to a certain question

asked the witness, Louis A. Haven, and permitting the same to be answered, which said question, objection, and answer are as follows:

“Q. And I will ask you, Mr. Haven, if it is not a fact that at that time you notified me with reference to the fact that he and Mr. Galen had gone toward the bar-room, or gone toward the bar-room, or something to that effect.

By Mr. METTLER.—We object to that as hearsay, and incompetent, irrelevant and immaterial for the purpose of the case.

By the COURT.—It is merely preliminary. He may answer. Objection overruled.

By Mr. METTLER.—Note our exception.

A. I don't think I ever stated that he went into [295] the bar-room. I mentioned that they went over toward the bar-room entrance is all I said.

28. The Trial Court erred as to defendant Galen in sustaining the objection of the plaintiff to a certain question asked the witness James H. Baldwin, which said question and objection are as follows:

“Q. I am asking you who those witnesses were, who would testify that they saw Warner take a drink in the Placer Hotel. The men that Mr. Wheeler meant when he told Warner that he had witnesses who would testify to that fact.

By Mr. WHEELER.—That is objected to as being improper cross-examination, and argumentative.

By the COURT.—The objection will be sustained to the last question.

By Judge PIGOTT.—Note our exception.”

29. The Trial Court erred as to defendant Galen in sustaining the objection of the plaintiff to a certain question asked the witness Charles Reibold, which said question, and objection are as follows:

“Q. Now, from your knowledge of the position of the two tables, and of the position of Mr. Galen between them, and of the route which would be taken by the jury in passing out, what have you to say as to whether it would be possible for one of the jurors to whisper to Mr. Galen without either Mr. Kelly, Mr. Alderson, Mr. Rae, or some of the other persons in that aisle observing the fact that he did whisper to him?

By Mr. WHEELER.—That is objected to as calling for a conclusion of the witness, an opinion of the witness upon a matter which is common knowledge.

By the COURT.—Objection sustained.

By Mr. METTLER.—Note our exception.”

30. The Trial Court erred as to defendant Galen in [296] sustaining the objection of the plaintiff to a certain question asked the witness Charles Reibold, which said question and objection are as follows:

“Q. In order for the juror to whisper to Mr. Galen in that position you may state what it would be necessary for him to do.

By Mr. WHEELER.—Object to that as call-

ing for an opinion, and conclusion of the witness.

By the COURT.—Objection sustained.

By Mr. METTLER.—Note our exception.”

WHEREFORE, defendant Galen prays that said judgment in favor of plaintiff and against the defendant be reversed and set aside, and that the Court be directed to enter judgment in favor of the defendant Galen and against the plaintiff.

F. W. METTLER,

W. T. PIGOTT,

E. G. TOOMEY,

L. O. EVANS,

F. C. WALKER,

Attorneys for Plaintiff in Error.

Filed July 7, 1917. Geo. W. Sproule, Clerk.

[297]

Thereafter, on July 7, 1917, Order Allowing Writ and Fixing Bond was duly filed herein, as follows, to wit:

(Title of Court and Cause.)

**Order Allowing Writ of Error and Fixing Bond on
Writ of Error.**

In the Matter of the Contempt of ALBERT J.
GALEN and DANIEL M. KELLY.

Upon motion of E. G. Toomey, Esq., one of the attorneys for the above-named defendant, Albert J. Galen, and upon filing a petition for writ of error and an assignment of errors, it is ORDERED that a writ of error be, and the same is hereby allowed, to

have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, be sent to the Circuit Court of Appeals aforesaid, and that the amount of bond on said writ of error be, and the same is hereby fixed at \$600, and that upon due execution and approval of said bond, the same shall act as a supersedeas, herein.

Done and dated at Helena, Montana, this 7th day of July, A. D. 1917.

BOURQUIN,
Judge.

Service of the foregoing Petition for Writ of Error, Assignment of Errors, and Order allowing Writ of Error and Fixing Bond on Writ of Error admitted and receipt of a true copy thereof acknowledged this 7th day of July, 1917.

B. K. WHEELER,
United States Attorney for Montana.

Filed July 7th, 1917. Geo. W. Sproule, Clerk.
[298]

Thereafter, on July 7, 1917, Bond on Writ of Error was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Bond on Writ of Error.

In the Matter of the Contempt of ALBERT J.
GALEN and DANIEL M. KELLY.

KNOW ALL MEN BY THESE PRESENTS:

That we, Albert J. Galen, as principal, and N. B. Holter and Q. A. Marlow, as sureties, are held and firmly bound unto the United States of America in the full and just sum of \$600, to be paid to the said United States of America, its attorneys, representatives, or assigns, to which payment well and truly to be made, we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this 7th day of July, A. D. 1917.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Montana, sitting at Helena, Montana, in said District, in a suit pending in said court, between the United States of America, Plaintiff, and Albert J. Galen and Daniel M. Kelly, as defendants, Cause No. 2860, final judgment was rendered against the said Albert J. Galen for the sum of Five Hundred and no/100 (\$500.00) Dollars and [299] costs of said suit, and the said Albert J. Galen has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court, in the aforesaid suit and a citation directed to the said United States of America, defendant in error, and its attorney, Hon. Burton K. Wheeler, United States Attorney for the District of Montana, citing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco in the State of California, according to law, within 30 days from the date hereof.

Now, the condition of the above obligation is such

that if the said Albert J. Galen shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALBERT J. GALEN, (Seal)
Principal.

N. B. HOLTER, (Seal)
Surety.

Q. A. MARLOW, (Seal)
Surety.

Approved this 7th day of July, A. D. 1917.

BOURQUIN,
District Judge. [300]

State of Montana,

County of Lewis and Clark,—ss.

N. B. Holter and Q. A. Marlow, being first duly sworn, each for himself, deposes and says, that he is worth the amount of the above obligation, exclusive of debts, liabilities, and property exempt from execution.

N. B. HOLTER.

Q. A. MARLOW.

Subscribed and sworn to before me this 7th day of July, 1917.

[Seal] EDMOND G. TOOMEY,
Notary Public for the State of Montana, Residing
at Helena, Montana.

My commission expires April 14, 1920.

Filed July 7, 1917. Geo. W. Sproule, Clerk.
[301]

Thereafter, on July 7, 1917, Writ of Error and Citation were duly issued herein, which original Writ of Error and Citation are hereto annexed, being in the words and figures following, to wit: [302]

In the District Court of the United States of America, District of Montana, Helena Division.

In the Matter of the Contempt of DANIEL M. KELLY and ALBERT J. GALEN.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL M. KELLY and ALBERT J. GALEN,
Defendants,

Writ of Error (Original).

United States of America,—ss.

The President of the United States of America, to the [Honorable Judge of the District Court of the United States for the District of Montana,
GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you between the United States of America, Plaintiff, and Daniel M. Kelly and Albert J. Galen, defendants, a manifest error has happened to the damage of said Albert J. Galen, one of the defendants, as by his complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment [303] be therein given,

that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals, may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 7th day of July, A. D. 1917.

[Seal] GEO. W. SPROULE,
Clerk of the United States District Court for the Dis-
trict of Montana.

The above Writ of Error is allowed this 7 day of July, 1917.

BOURQUIN,
District Judge.

Answer of Court to Writ of Error.

The Answer of the Honorable, The District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of said District Court of the United States for the District of Montana, to the Honorable

The United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,
Clerk.

By C. R. Garlow,
Deputy. [304]

*In the District Court of the United States of
America, District of Montana, Helena Division.*

In the Matter of the Contempt of DANIEL M.
KELLY and ALBERT J. GALEN.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL M. KELLY and ALBERT J. GALEN,
Defendants.

Citation on Writ of Error (Original).

United States of America,—ss.

To the United States of America, Defendant in
Error, and Its Attorney Burton K. Wheeler,
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, State of California, within thirty days from the date of this writ pursuant to a writ of error filed in the Clerk's office of

the District Court of the United States for the District of Montana, wherein Albert J. Galen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf. [305]

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, this 7 day of July, A. D. 1917, and of the Independence of the said United States the 141st year.

BOURQUIN,
District Judge.

[Seal] Attest: GEO. W. SPROULE,
Clerk U. S. District Court, District of Montana.

[306]

**Admission of Service of Writ of Error and Citation
on Writ of Error.**

I hereby, this 20 day of July, A. D. 1917, accept due personal service of the foregoing Writ of Error and Citation on Writ of Error on behalf of the United States of America, defendant in error, and acknowledge receipt of true copy of said Writ of Error and Citation on Writ of Error.

B. K. WHEELER,
United States Attorney for the District of Montana.

By HOMER G. MURPHY,
Assistant United States Attorney for the District of
Montana. [307]

[Endorsed]: No. 2860. In the District Court of the United States of America, District of Montana. In re Contempt of D. M. Kelly and A. J. Galen. United States of America, Plaintiff, vs. Daniel M. Kelly and A. J. Galen, Defendants. Writ of Error and Citation on Writ of Error. Defendant Galen. Filed July 20th, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [308]

Thereafter, on July 25, 1917, Order Extending Time to Filed Record on Appeal was duly entered herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Order Enlarging Time for Filing Record and Docketing Case in Circuit Court of Appeals for the Ninth Circuit on Writ of Error for Defendant Galen Herein.

For good cause shown, and in accordance with Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the time within which the record may be filed and the case docketed, on writ of error of the defendant Galen herein, in the Circuit Court of Appeals for the Ninth Circuit, is extended thirty (30) days from the return day of the Citation heretofore issued and served herein, said return day begins August 7th, 1917, and extended to September 7th, 1917. And this order is ordered filed with the Clerk of said Circuit Court of Appeals.

Entered, in open court, July 25, 1917.

GEO. W. SPROULE,

Clerk. [309]

Thereafter, on July 31, 1917, Praeceptum for Transcript of Record on Appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Praeceptum to Clerk Directing Contents of Transcript on Writ of Error of Defendant Galen.

To Geo. W. Sproule, Clerk of the Court Aforesaid:

Please make up the transcript on the writ of error of defendant Galen herein, taking care that same is a true and complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in the United States Circuit Court of Appeals for the Ninth Circuit, and to that end including therein:

1. The information.
2. The process and return.
3. The issue as made by motion to quash the order to show cause, by demurrer to the information, and by the plea thereto.
4. The findings.
5. The judgment.
6. The opinion of the Court.
7. Bill of exceptions duly settled and authenticated.
8. Petition for writ of error.
9. Assignment of errors.
10. Bond and approval.
11. Allowance of writ of error.
12. The writ of error.

13. Citation in error.
14. Order extending time for return day of said citation.
15. Clerk's certificate and all other papers and documents necessary to a complete record on said writ of error.

You are notified that the first six papers enumerated above are incorporated in full in, and comprise part of, the bill of exceptions herein, and for that reason need be set out in full but once in said transcript on Writ of Error.

F. W. METTLER,
L. O. EVANS,
W. T. PIGOTT,
E. G. TOOMEY,
F. C. WALKER,
Attorneys.

Filed July 31, 1917. Geo. W. Sproule, Clerk.
[310]

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 310 pages, numbered consecutively from 1 to 310, inclusive, is a full, true and correct transcript of the

pleadings, process, orders and judgment and all other proceedings had in said cause required to be incorporated in the transcript of record therein by the praecipe of the plaintiff in error for said transcript of record, including said praecipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original writ of error and citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of One Hundred Thirty-five 50/100 Dollars (\$135.50), and have been paid by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 17th day of August, A. D. 1917.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk. [311]

[Endorsed]: No. 3047. United States Circuit Court of Appeals for the Ninth Circuit. Albert J. Galen, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of

Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed September 6, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the District Court of the United States of America, District of Montana, Helena Division.

In the Matter of the Contempt of DANIEL M. KELLY and ALBERT J. GALEN.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL M. KELLY and ALBERT J. GALEN,
Defendants.

Order Enlarging Time for Filing Record and Docketing Case in Circuit Court of Appeals for the Ninth Circuit on Writ of Error of Defendant Kelly Herein.

For good cause shown, and in accordance with Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the time within which the record may be filed and the case docketed, on writ of error of the defendant Kelly herein, in the Circuit Court of Appeals for the Ninth Circuit, is extended thirty (30) days from the return day of the citation heretofore issued and

served herein, said return day being August 7th, 1917, extended to Sept. 7th, 1917. And this order is ordered filed with the Clerk of said Circuit Court of appeals.

BOURQUIN,
District Judge.

Due and sufficient service of the foregoing order and receipt of a true copy thereof admitted this 24 day of July, 1917.

B. K. WHEELER,
United States Attorney for Montana.
By HOMER G. MURPHY,
Assistant United States Attorney for Montana.

[Endorsed]: No. 2860. In the District Court of the United States of America, District of Montana. U. S. of America, Plaintiff, vs. D. M. Kelly and A. J. Galen, Defendants. Order Enlarging Time etc. Kelly. Entered July 25, 1917. Geo. W. Sproule, Clerk.

No. 3047. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to September 7, 1917, to File Record Thereof and to Docket Case. Filed Jul. 30, 1917. F. D. Monckton, Clerk. Refiled Sep. 6, 1917. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 3047.

ALBERT J. GALEN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Stipulation for Diminution of Record.

WHEREAS, by oversight or inadvertence, Defendant's Exhibit No. 1, which is shown to have been duly and regularly offered and received in evidence at page 126 of the transcript, was not incorporated as a part of the Bill of Exceptions in the above-entitled case; and

WHEREAS, such exhibit should properly be before the above-entitled court as a part of the record in said cause:

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between B. K. Wheeler, United States Attorney for the District of Montana, and W. T. Pigott, L. O. Evans, Charles Donnelly, William Wallace, Jr., F. W. Mettler, F. C. Walker, O. W. McConnell, and E. G. Toomey, attorneys for the plaintiff in error, that Defendant's Exhibit No. 1 hereto attached is a true and correct copy of the said Defendant's Exhibit No. 1, introduced in evidence before the trial court, as shown at page 126 of the record, and that the same may be used and considered, to all intents and purposes before the

above-entitled court, the same as though it had been incorporated originally in the Bill of Exceptions, and made a part of the record in said case.

Dated at Helena, Montana, this 5th day of December, 1917.

B. K. WHEELER,

U. S. Attorney,

Attorney for Defendant in Error.

W. T. PIGOTT,

L. O. EVANS,

CHARLES DONNELLY,

WM. WALLACE, Jr.,

F. W. METTLER,

F. C. WALKER,

O. W. McCONNELL and

E. G. TOOMEY,

Attorneys for Plaintiff in Error.

By A. J. G.

Defendant's Exhibit No. 1.

SENATE BILL NO. 61.

Introduced by Hogan.

A BILL FOR AN ACT ENTITLED:

An Act requiring all railroad corporations operating in the State of Montana, and having repair shops within the State, to have all defective or broken cars, coaches, locomotives, or other equipment owned or leased by said corporation repaired, renovated, or rebuilt in the State of Montana, and providing for a penalty for the violation of this Act.

Be it Enacted by the Legislative Assembly of the State of Montana:

Section 1. All railroad corporations operating in the State of Montana, and required to have repair shops within the State shall and are hereby required to repair, renovate or rebuild in the State of Montana, any and all defective or broken cars, coaches, locomotives or other equipment owned or leased by said corporation in the State of Montana, when such rolling stock is within the State of Montana; provided that such railway corporation shall have or shall be compelled to have proper facilities in the State to do such work; and provided further, that this Act shall not be so construed as to require any railway corporation to violate the safety appliance law of the Congress of the United States, And provided further that no such railway company shall haul or be permitted to haul for purpose of repair, any disabled equipment by or pass any shop owned or operated by any such company where said disabled equipment can be repaired, in order to reach some other repair shop at a greater distance for purposes of repairing said disabled equipment.

Section 2. All railroad corporations operating in the State of Montana, and having repair shops within the State shall be prohibited from sending or removing any of their cars, coaches, locomotives or other equipment out of the State of Montana, to be repaired, renovated or rebuilt, when the same is in a defective or broken condition, and within the State.

Section 3. The provisions of this Act shall not apply in cases of strikes, fires, or other unforeseen casualties and emergencies.

Section 4. That the removal of each defective or broken coach, car, locomotive, or other equipment, from the State to be repaired, renovated or rebuilt, shall constitute a separate offense, under this Act.

Section 5. Any railway corporation, lessee, receiver, superintendent or agent, who shall violate any of the provisions of this Act, shall be guilty of a misdemeanor, and after conviction by any court of competent jurisdiction, shall be liable to a fine of not less than One Hundred (\$100) Dollars, and not more than Five Hundred (\$500) Dollars.

Section 6. This Act shall be in full force and effect from and after its passage and approval.

[Endorsed]: No. 3047. U. S. Circuit Court of Appeals, 9th Circuit. Albert J. Galen, Pltf. in Error, vs. U. S. of America, Def. in Error. Stipulation for Diminution of Record. Filed Dec. 10, 1917. F. D. Monckton, Clerk.